

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
REGION 4**

STARBUCKS CORPORATION d/b/a	:	
STARBUCKS COFFEE COMPANY	:	
	:	
Respondent,	:	
	:	
and	:	
	:	
PHILADELPHIA BARISTAS UNITED	:	Case 04-CA-252338
	:	
and	:	
	:	
ECHO NOWAKOWSKA, an Individual	:	Cases 04-CA-256390
	:	04-CA-256401
and	:	04-CA-258416
	:	
TRISTAN J. BUSSIERE, an Individual	:	Cases 04-CA-256398
	:	04-CA-256399
Charging Parties.	:	04-CA-257024
	:	
	:	

**RESPONDENT'S POST HEARING BRIEF TO THE
ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	2
A. Starbucks Corporation and the Parties.....	2
1. Starbuck’s Unique Culture Focusing on its Partners and the Customer Experience.....	2
2. Relevant Reporting Structures and Managers at Broad & Washington.	2
3. Structure of the Partner Resources Department.....	3
B. Starbucks’s Commitment to the Partner Experience and its Open-Door Policy.....	4
C. Starbucks Responses to Partner Complaints.....	5
1. Starbucks Response to Bussiere July 15, 2019 PRSC Complaint.....	5
2. Starbucks Response to List of Complaints Presented at July 22, 2019 Protest.....	6
3. Starbucks’s Response to November 25 Demonstration.....	12
D. Tristan J. Bussiere’s Employment with Starbucks	12
1. Mr. Bussiere’s Conduct Under Mr. Vaughan	12
2. November 21, 2019 Written Warning.....	14
3. Barista Trainer Opportunities at Broad & Washington Store.....	18
4. February 6, 2020 Written Warning.....	19
5. Mr. Bussiere’s Interactions with Ms. Bissell	20
6. Mr. Bussiere’s Termination.....	23
E. Echo Nowakowska.....	25
1. Ms. Nowakowska’s Conduct Under Mr. Vaughan.....	25
2. October 29, 2019 Written Warning.....	25
3. Ms. Nowakowska’s December 2019 Coaching	28

TABLE OF CONTENTS

	PAGE
4. Ms. Nowakowska's Termination.....	28
5. Ms. Nowakowska's Scheduled Hours of Work	32
F. Jean Hippensteel and Sean Korman's visit to the Broad & Washington Store.....	35
G. Store Manager Navy Ros.....	36
III. LEGAL STANDARD	37
A. Legal Standard for Section 8(a)(1) Interference Claims.....	37
B. Legal Standard for Section 8(a)(1) Interrogation Claims.....	38
C. Legal Standard for Section 8(a)(1) Surveillance Claims.....	39
D. Legal Standard for Section 8(a)(3) Claims	40
IV. ARGUMENT.....	42
A. Starbucks Did Not Violate the Act by Disciplining and Discharging Echo Nowakowska and TJ Bussiere	43
1. General Counsel Failed to Establish Substantial Anti-Union Animus.....	43
2. The General Counsel and the Charging Parties Did Not Prove Animus by Direct Evidence.....	43
a. The General Counsel and the Charging Parties Did Not Produce Circumstantial Evidence Sufficient to Support an Inference Of Animus	46
b. Credible Uncontroverted Evidence Indicates Starbucks Supported Partner's Engagement in Protected Concerted Activity.....	47
c. Brief Expressions of Frustration by Management Are Insufficient to Support an Inference of Animus.....	48
d. An Assessment of Temporal Proximity Weighs Against an Inference of Animus.....	49

TABLE OF CONTENTS

PAGE

e.	Evidence That the Parties Implemented Additional Levels of Scrutiny for the Disciplinary Actions Weighs Against An Inference Of Animus.....	50
3.	Ms. Nowakowska and Mr. Bussiere Were Disciplined for Legitimate Business Reasons.	51
a.	Ms. Nowakowska Received a Written Warning For Failing To Make Customer Connections and Not Following The Drink Hand-Off Procedure.....	51
b.	Ms. Nowakowska Was Terminated For Poor Customer Service After She Was Hostile and Rude To Customers.....	53
c.	Ms. Nowakowska's Discipline and Termination Was Consistent With How Starbucks Has Treated Other Partners Who Engaged In Similar Behavior.....	54
d.	Tristan Bussiere Was Disciplined for Repeatedly Disregarding His Supervisor's Directives.....	55
e.	Bussiere's Discipline Was Consistent With How Starbucks Has Treated Other Partners Who Engaged In Similar Behavior and He Was In Fact Given More Opportunities to Correct His Behavior Before Being Disciplined.....	57
f.	Mr. Bussiere Was Terminated For Spreading A False Rumor That Another Partner Was Going To Be Terminated.....	58
(1)	Mr. Bussiere knowingly spread a false rumor that Mr. Allen was going to be terminated.....	58
(2)	Mr. Bussiere's Actions Tarnished Partner Morale and impacted the overall store environment.....	59
(3)	Mr. Bussiere lying about Mr. Allen did not constitute protected concerted activity.....	61
(4)	Here there is no evidence that Mr. Bussiere sought to initiate or prepare for group action.	61
B.	Jean Hippensteel and Sean Korman Did Not Unlawfully Surveil Partners.....	62
C.	Navy Ros Did Not Unlawfully Surveil Partners.....	65

TABLE OF CONTENTS

PAGE

D.	Navy Ros Did Not Interrogate Partners About Their Union Activities.....	66
E.	Starbucks did not discriminate against Mr. Bussiere with regard to barista training.....	68
F.	Starbucks Did Not Interfere with Employees Section 7 Rights.....	69
1.	Ms. Bissell’s Statements Did Not Violate Section 8(a)(1) of the NLRA.....	69
2.	Mr. Vaughan’s Statements Did Not Violate the NLRA.....	70
3.	Mr. Dragone’s Statements Did Not Violate the NLRA.....	72
4.	Mr. Eckensberger’s Statements did not violate the NLRA.....	73
G.	Reinstatement And Backpay Are Barred Because Starbucks Would Have Terminated Charging Parties For Violating Its Lawful No-Recording Policy.....	74
1.	Starbucks Established that it maintained a lawful no-recording policy and that Ms. Nowakowska and Mr. Bussiere repeatedly violated the Policy.....	75
2.	Mr. Bussiere and Ms. Nowakowska’s recordings lose the protections of the NLRA Because They Violated Starbucks Policy and Pennsylvania law.....	78
3.	Starbucks has established that it would have terminated Mr. Bussiere and Ms. Nowakowska if it had known that they recorded other partners without their consent and that they are not eligible for re-hire.....	81
V.	CONCLUSION.....	82
VI.	PROPOSED CONCLUSIONS OF LAW REMEDY AND NOTICE.....	82

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

Page(s)

Cases

<i>ADT, LLC & Int'l Bhd of Elec. Workers, Locals 46 & 76,</i> No. 19-CA-216379, 2019 WL 3006928 (July 9, 2019).....	76, 79
<i>Agnew v. Dupler,</i> 553 Pa. 33, 717 A.2d 519 (1998).....	79
<i>Aladdin Gaming, LLC.,</i> 345 NLRB 585 (2005).....	39, 63, 66
<i>In Re Aldworth Co.,</i> 338 NLRB 137 (2002).....	75
<i>Allied Aviation Fueling of Dallas,</i> 347 NLRB 248 (2006).....	46
<i>Alstate Maintenance LLC,</i> 367 NLRB No. 68 (Jan. 19, 2011).....	61
<i>American Freightways Co.,</i> 124 NLRB 146 (1959).....	38
<i>Argyropoulos v. City of Alton,</i> 539 F.3d 724 (7th Cir. 2008).....	80
<i>Brantley v. Wysocki,</i> 662 Fed. Appx. 138 (3d Cir. 2016).....	80
<i>Broadway,</i> 267 NLRB 385 (1983).....	62, 64
<i>Brown Transp. Corp.,</i> 294 NLRB 969 (1989).....	39
<i>Camarco Loan Mfg. Plant,</i> 356 NLRB 1182 (2011).....	38
<i>CEC Chardon Elect.,</i> 302 NLRB 106 (1991).....	40, 41

<i>Com. v. Smith,</i> 2016 PA Super 43, 136 A.3d 170 (2016)	80
<i>Continental Indus., Inc.,</i> 279 N.L.R.B. 920 (1986)	70
<i>Donaldson Bros. Ready Mix, Inc.,</i> 341 NLRB 958 (2004)	38
<i>Encino Hosp. Med. Ctr.,</i> 360 NLRB 335 (2014)	62
<i>Finlay Bros. Co.,</i> 282 NLRB 737 (1987)	48
<i>Frierson Bldg. Supply Co.,</i> 328 NLRB No. 149 (1999)	50
<i>Frontier Tel. of Rochester, Inc.,</i> 344 NLRB 1270 (2005)	46
<i>G&L Real Estate,</i> 2019 NLRB LEXIS 603 (2019)	76
<i>G4S Secure Solutions (USA) Inc.,</i> 364 NLRB No. 92, slip op. (2016)	69
<i>Gossen Co.,</i> 254 NLRB 339 (1981), modified on other grounds	39
<i>Hawaii Tribune-Herald,</i> 356 NLRB 661 (2011)	79
<i>Hoschton Garment Co.,</i> 279 NLRB 565 (1986)	39
<i>Hudson, Inc.,</i> 275 NLRB 874 (1985)	48
<i>Impact Indus.,</i> 285 NLRB 5 (1987)	39, 65
<i>John Cuneo, Inc,</i> 298 NLRB 856 (1990)	74, 75, 82
<i>Jones v. St. Jude Med. S.C., Inc.,</i> 504 F. App'x 473 (6th Cir. 2012)	80

<i>Keith Miller,</i> 334 NLRB 824 (2001)	38
<i>Keller Mfg. Co.,</i> 272 NLRB 763 (1984)	37
<i>KSM Indus.,</i> 336 NLRB 133 (2001)	69
<i>La Mousee, Inc.,</i> 259 NLRB 37 (1981)	47
<i>Laidlaw Envtl. Servs.,</i> 314 NLRB 406 (1994)	49
<i>Lakeside-Scott v. Multnomah Cty.,</i> 556 F.3d 797 (9th Cir. 2009)	51
<i>Liberty Homes, Inc.,</i> 257 NLRB 1411 (1981)	41
<i>Lutheran Social Serv.,</i> 250 NLRB 35 (1980)	60
<i>Manor Care of Easton, Pa, LLC,</i> 4-CA-36064, 2009 WL 196092 (Jan. 23, 2009)	43
<i>Marshall Durbin Poultry Co.,</i> 310 NLRB 68 (1993)	75
<i>McClain & Co.,</i> 358 NLRB 1070 (2012)	38
<i>McKennon v. Nashville Banner Publ'g Co.,</i> 513 U.S. 352 (1995)	75
<i>Mediplex of Danbury,</i> 314 NLRB 470 (1994)	38, 69
<i>Meyers Indus.,</i> 268 NLRB 493 (1984)	61
<i>Meyers Indus.,</i> 281 NLRB 882 (1986)	61
<i>Milum Textile Servs. Co.,</i> 357 NLRB 2047 (2011)	62, 65

<i>In Re Mississippi Action for Progress, Inc.</i> , 2002 WL 31386007 (NLRB Oct. 18, 2002).....	40
<i>Monroe Mfg.</i> , 323 NLRB No. 2 (1997).....	51
<i>Motor City Pawn Brokers Inc.</i> , 369 NLRB No. 132 (2020).....	72
<i>Multi-Aid Service</i> , 331 NLRB 1126 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).....	39
<i>Mushroom Transp. Co. v. N. L. R. B.</i> , 330 F.2d 683 (3d Cir. 1964).....	61
<i>N.L.R.B. v. Datapoint Corp.</i> , 642 F.2d 123 (5th Cir. 1981).....	61
<i>NLRB v. Kay Elecs., Inc.</i> , 410 F.2d 499 (8th Cir. 1969).....	49
<i>NLRB v. Savoy Laundry</i> , 327 F.2d 370 (2d Cir. 1964).....	41
<i>NLRB v. Transp. Mgmt.</i> , 462 U.S. 393 (1983).....	43, 62
<i>Office of Workers Comp. Programs v. Greenwich Collieries</i> , 512 U.S. 267 (1994).....	43
<i>Old Tucson Corp.</i> , 269 NLRB 492 (1984).....	47
<i>P.V.M.I. Assocs.</i> , 328 NLRB 1141 (1999).....	39
<i>Page Avjet, Inc.</i> , 278 NLRB 444 (1986).....	67, 68
<i>River Falls Healthcare, LLC d/b/a Kinnic Health & Rehab and United Food and Commercial Workers, Local 1189</i> , 2014 WL 3347515 (NLRB July 7, 2014).....	40
<i>Robert Orr/Sysco Food Servs.</i> , 343 NLRB 1183 (2004).....	43
<i>Rossmore House</i> , 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).....	38

<i>Ryder Distrib 'n Res., Inc.</i> , 311 NLRB 814 (1993)	41
<i>Sage Dining Servs., Inc.</i> , 312 NLRB 845 (1993)	39
<i>Spring v. Sealed Air Corp.</i> , Civ. A. No. 10-4655, 2011 U.S. Dist. LEXIS 108331 (E.D. Pa. Sep. 21, 2011)	51
<i>Station Casinos, LLC</i> , 358 NLRB 1556 (2012)	69
<i>Steel-Tex Mfg. Corp.</i> , 206 NLRB 461 (1973)	46
<i>Sunnyvale Med. Clinic</i> , 277 NLRB No. 131 (1985)	67, 68
<i>Super Tire Stores</i> , 236 NLRB 877 (1978)	41
<i>The Boeing Co.</i> , 365 NLRB No. 154 (2017)	72, 76
<i>Tschiffrie Props., Ltd. v. NLRB</i> , 896 F.3d 880 (8th Cir. 2018)	75
<i>Tschiggfrie Props., Ltd & Teamsters Local 120</i> , Case 25-CA-161304, 365 NLRB No. 34 (Feb. 13, 2017), enf'd in part	75
<i>United Parcel Serv.</i> , 311 NLRB 974 (1993)	62
<i>Upper Great Lakes Pilots, Inc.</i> , 311 NLRB 131 (1993)	40, 41
<i>Wright Line Inc.</i> , 251 NLRB 1083 (1980)	40, 41, 43, 68
<i>Yusuf Mohamed Excavation</i> , 283 NLRB 961 (1987)	41
Statutes	
5 U.S.C. § 556(d)	37
29 U.S.C. § 157	<i>passim</i>
29 U.S.C § 158(a)(1)	<i>passim</i>

29 U.S.C. § 158(a)(3)	<i>passim</i>
29 U.S.C. § 160(c).....	37
ADEA.....	75
NLRA.....	<i>passim</i>
Pennsylvania Wiretap Act, 18 PA. CONS. STAT. § 5702.....	79, 80

I. INTRODUCTION

This case was heard by Administrative Law Judge Andrew J. Gollin on February 2, 3, 4, 5, 8, and 10, 2021 via Zoom. Respondent Starbucks Corporation d/b/a Starbucks Coffee Company (“Starbucks” or “Respondent”), submits this post-hearing brief in support of its position that no violation of the National Labor Relations Act (“NLRA”) has been established. The Complaint issued against Starbucks on August 26, 2020 alleged violations of Section 8(a)(1) and (3) of the NLRA. (GCX1-000071-86). On February 2, 2021, the General Counsel submitted a Motion to Amend the Consolidated Complaint against Starbucks, asserting two (2) additional alleged violations of Section 8(a)(1) and (3) of the NLRA. (GC-33). The General Counsel’s Motion to Amend the Consolidated Complaint was granted. (Tr. 25).¹ Starbucks answered the Complaint on September 9, 2020 and filed an amended answer on October 14, 2020 denying that any unfair labor practices had occurred. (GCX1-000087-105).²

As demonstrated at hearing, the Respondent did not violate the NLRA. The record shows that the Employer disciplined the Charging Parties for legitimate business reasons, and that they were treated the same as other similarly situated partners, regardless of their alleged protected activities. There is no substantial, admissible evidence of anti-union animus. While Starbucks was aware of public in-person demonstrations and public social media posts, Starbucks never made any disparaging remarks about the union or its employees potential union activities. Moreover, an assessment of the temporal relationship between all the alleged protected activity in this matter and the adverse actions does not support an inference of causation. In fact, a careful assessment of the timing of the relevant events suggests just the opposite and that Starbucks gave both charging

¹ The resulting Amended Consolidated Complaint is referred to herein as the “Complaint.”

² In response to the General Counsel’s amended complaint, Respondent filed an amended answer on February 17, 2021.

parties ample opportunity to improve their conduct before disciplining and ultimately being forced to terminate them.

Starbucks presented evidence showing that other partners who did not engage in the alleged protected activities were also disciplined for the same or similar violations of Company policy. Further, there is evidence that other partners who engaged in the same alleged protected activities were not disciplined or terminated by the company. The Administrative Law Judge should accordingly dismiss the Complaint for all the reasons outlined below.

II. FACTUAL BACKGROUND

A. Starbucks Corporation and the Parties

1. Starbucks's Unique Culture Focusing on its Partners and the Customer Experience

Starbucks is an American multinational chain of coffeehouses and roastery reserves headquartered in Seattle, Washington. Starbucks operates a coffeehouse located at Broad and Washington Streets in Philadelphia, PA. ("Broad & Washington"). Customer service is at the core of Starbucks's operations. (JX2a-00009.) Starbucks seeks to create a culture of "warmth and belonging where everyone is welcomed." (*Id.*) Starbucks refers to its store environment as the "Third Place" – "a respite from the outside world[.] . . . [S]omewhere where [customers] can come in and get a cup of coffee" and make connections. (Tr. 1334).

2. Relevant Reporting Structures and Managers at Broad & Washington.

From approximately January 2019 to July 2019, Erin Graves was the Store Manager at the Broad & Washington store. (Tr. 317). Following an investigation into complaints raised by the charging parties and others, Ms. Graves resigned from Starbucks and was replaced by Jean Hippensteel, who managed the Broad & Washington store as well as her own store from August 2019 to September 2019. (Tr. 107).

David Vaughan Jr. assumed the Store Manager position at Broad & Washington in September 2019 and has continued in that title through the present. (Tr. 107). Mr. Vaughan had never been a Store Manager prior to working at Broad & Washington. (Tr. 769). As a result, he received on-the-job training and development from a Starbucks Operations Coach and on-going mentoring by fellow Store Managers, including Ms. Hippensteel, and Sean Korman, Store Manager at the nearby Broad & Jackson location. (Tr. 791-92; 1227-28).

The aforementioned Broad & Washington Store Managers reported to District Manager Brian Dragone during the relevant time period. (Tr. 630). District Managers, like Mr. Dragone, are generally responsible for overseeing between eight to twelve stores. (Tr. 50). Mr. Dragone reported to Marcus Eckensberger, Regional Director. (Tr. 49). Mr. Eckensberger is responsible for Mid-Atlantic operations, including all of Starbucks' retail stores in Philadelphia. (Tr. 1323).

Charging Party Tristan Bussiere was employed as a barista at the Broad & Washington store from January 2019 to February 2020. (Tr. 317). Charging Party Echo Nowakowska was employed as a barista at the Broad & Washington store from January 2019 until January 2020. (Tr. 106).

3. Structure of the Partner Resources Department

Starbucks refers to all its employees as "partners." (Tr. 43). The Partner Resources Department is responsible for supporting all partners, which includes handling partner relations and engagement. (*Id.*; Tr. 71). In July 2019, Gerald Henderson was the Partner Resource Manager responsible for the Broad & Washington store. (Tr. 73). Mr. Henderson took a leave of absence in November 2019 and was replaced on an interim basis by Michael Rose, who, at the time, was employed as a District Manager and had not previously worked in the Partner Resources Department. (Tr. 59; Tr. 73-74). Both Mr. Rose and Mr. Henderson reported to Natalie Cioffi, Partner Resources Director, for the mid-Atlantic Region. (Tr. 43; 71; 76).

B. Starbucks's Commitment to the Partner Experience and its Open-Door Policy

At all times relevant to the Complaint, Starbucks maintained a Partner Guide. (JX2a-b). The Partner Guide contains all the Company's policies with regard to terms and conditions of employment, including Starbucks open door policy. Starbucks actively encourages its partners to communicate their concerns and experiences, and to provide feedback about business practices. (JX2a-000042-44). There are several ways in which partners may communicate their concerns. Starbucks encourages partners to provide feedback to their Store Manager, District Manager, or a Partner Resources Team member. (Tr. 72). Starbucks also regularly holds Partner Open Forums, town halls, and webcasts where partners can share their feedback with management. (JX2a-000044).

When Starbucks learns of any situation that may violate any of its policies, it immediately undertakes a thorough investigation, which is either completed by the next level of management or its Ethics & Compliance Department. (Tr. 72). Further, Starbucks strictly prohibits retaliation against any partner who, in good faith, reports potential violations of any Starbucks policies or applicable laws, or who raises a complaint through the established complaint procedure or otherwise. (JX2a-000029); (Tr. 82). Ms. Nowakowska and Mr. Bussiere confirmed they received a copy of the Partner Guide during their employment. (Tr. 300; 320).

As part of its focus on the partner and customer experience, when there is an unusual or significant event, Starbucks reacts immediately and comprehensively. Depending on the nature of the event, that response can include multiple areas and levels of the organization. (Tr. 1102). For instance, in April 2018 a Store Manager at a Philadelphia store called the police and asked them to remove two African American men who had been sitting at the café without purchasing anything from the store. (Tr. 1103). In the weeks that followed Starbucks leadership, including the district

manager, regional director, regional vice-president, and the chief operating officer, went to the Philadelphia store to meet with partners and to talk about how they were feeling (Tr. 1103-04). Starbucks leaders also held roundtables giving partners a chance to express their concerns and opinions, and to help formulate a response to the event. (Tr. 1104). Starbucks deployed additional resources to its stores for any incidents involving police, fire, ambulances, and drug-related events. (Tr. 1102-03). In March 2020, after local black lives matter protests which resulted in property damage to Starbucks stores in Philadelphia, Starbucks also provided additional support to its partners to make sure that they were ok. (Tr. 1102).

Starbucks leadership is also alerted when there are any disruptions to operations at its stores or any incidents that could attract negative attention. (Tr. 97-99). Examples of such disruptions include: a customer setting themselves on fire at store; partner interactions with customers which are then published on social media; incidents where partners use the wrong name or an inappropriate name on a cup; customers using Starbucks stores as a location for drug exchanges; and incidents of customer violence at stores. (*Id.*). Similarly, when Broad & Washington partners raised concerns, Starbucks alerted its leadership and responded by pooling its resources to support its partners.

C. Starbucks Responses to Partner Complaints

1. Starbucks Response to Bussiere July 15, 2019 PRSC Complaint

On or about July 15, 2019, Mr. Bussiere called the Partner Resources complaint hotline and asked questions about the partner handbook and store operations. (Tr. 320). Mr. Bussiere also asked how he could resolve issues with his Store Manager. (*Id.*) The Partner Resources department provided Mr. Bussiere with the telephone number for partner resources manager Gerald

Henderson.³ (*Id.*) On July 17, Mr. Henderson went to the Broad & Washington store to speak with partners, including Mr. Bussiere, about their concerns in the store. (Tr. 88-89).

2. Starbucks Response to List of Complaints Presented at July 22, 2019 Protest

On July 22, a group of current and former Starbucks partners as well as a number of individuals unaffiliated with Starbucks walked into Broad & Washington during normal business hours and presented the Store Manager with a list of complaints. (Tr. 114). Among other things, the list included a demand for the immediate removal of Ms. Graves and allegations of discrimination:

1. We demand that Erin steps down or is removed from her position as store manager immediately.
....
3. We demand that store managers at Broad and Washington are held accountable for discriminatory language and actions against workers of color, LGBTQ+ workers, and workers with disabilities or illnesses. We demand that this accountability applies to addressing discrimination

-by customers against workers
-by coworkers against workers
-and by managers against workers.

(JX-1).

The letter did not explain why the group was seeking Ms. Grave's removal from Broad & Washington, nor did it identify any specific instances of discrimination or individuals who were involved in the alleged discrimination. Seven partners, including Mr. Bussiere and Echo Nowakowska, signed the letter.⁴ (*Id.*) Partners stopped work while the demonstration was going

³ Mr. Henderson left Starbuck's employ in either January or February of 2020 (Tr. 44:14-19).

⁴ Although a nother five partners signed the demand letter, the General Counsel does not allege that Starbucks discriminated against the other five partners who signed the July 22 letter.

on due to the confusion and customers were unable to place and receive their orders. (GXC34). The demonstration was filmed and uploaded to public social media platforms. (GCX20). The public posts specifically mentioned “Starbucks” and contained the hashtags “#starbucksphiladelphia,” “#starbucksphilly,” and/or “#starbucks.” (*Id.*) On the same date, Starbucks managers received an email with a copy of the demand letter from the email handle broadandwashingtonunited@gmail.com that included a cover email with the words: “You have three days to respond.” (GCX17-000002).

Starbucks’s management was completely surprised by this event. Nathalie Cioffi, Partner Resources Director, noted it was “shocking to us because we, you know, you're talking about discrimination against people's color, LGBTQ, you know, treatment of workers space, their schedule not being respected. These were things that for us, that's not what we stand for, but I would qualify them by reading them as shocking and egregious if the Store Managers were to create that kind of environment.” (Tr. 93). Starbucks immediately began investigating partner concerns raised in the demand letter, including the allegations against Store Manager Graves. (Tr. 127).

The next day, Ms. Cioffi and Mr. Henderson went to Broad & Washington to speak to partners. (*Id.*) Among the partners with whom they met were Mr. Bussiere and Ms. Nowakowska. (Tr. 127-28). Mr. Bussiere and Ms. Nowakowska asked to meet with Mr. Henderson jointly, and he agreed to this request. (Tr. 128). During this meeting Mr. Henderson asked Mr. Bussiere and Ms. Nowakowska if they had “any complaints” or “issues” (Tr. 129-30).

About halfway through the meeting, Ms. Cioffi joined the conversation. (Tr. 129). Ms. Cioffi was interested in hearing about Ms. Nowakowska’s personal knowledge of incidents of discrimination at the store. (Tr. 132). However, Ms. Nowakowska told Ms. Cioffi that she would

provide a more detailed accounting of the allegations at a later time. (Tr. 132). On July 25, 2019 Ms. Cioffi, Mr. Dragone, and Mr. Henderson received an email from the domain broadandwashingtonunited@gmail.com. (GCX18). The email contained a more detailed description of complaints related to “scheduling,” “bullying and discrimination,” and “retaliation and safety.” The email was unsigned and did not contain the name of the author(s) or any other identifying information, but Ms. Cioffi assumed that it was from Mr. Bussiere and Ms. Nowakowska since it contained some of the additional details regarding the complaints in the July 22 letter that she had asked about when at Broad & Washington and that they had indicated they would provide in a follow up written communication. (Tr. 135).

Ms. Cioffi and Marcus Eckensberger, Regional Director of Operations for the Mid-Atlantic Region, went back to the store the next day to interview partners, and met with Ms. Nowakowska and Mr. Bussiere (Tr. 136). During this meeting, Mr. Bussiere attempted to call a former partner to join the meeting by phone, but Ms. Cioffi asked to meet solely with Mr. Bussiere and Ms. Nowakowska. (R-1A; R-1B). Unbeknownst to Mr. Eckensberger and Ms. Cioffi, Ms. Nowakowska made an audio recording of the entire conversation between Mr. Eckensberger, Ms. Cioffi, Mr. Bussiere, and Ms. Nowakowska. (Tr. 297; R-1A; R-1B).

During this conversation, Mr. Eckensberger explicitly told Mr. Bussiere and Ms. Nowakowska that Starbucks maintains a “very strict no retaliation policy” and that he wanted to establish an “open channel of communication” with them. (R-1A; R-1B). In response, Mr. Bussiere stated that he was concerned that Starbucks had retaliated against him because he had raised concerns to Mr. Dragone. (*Id.*). Mr. Bussiere explained that the day after he called Mr. Dragone and complained to Partner Resources: (1) his old Store Manager went to the Broad & Washington store and sat “in the corner with her laptop”; (2) that his Store Manager came in on her day off and

“sat in corner on her laptop”; (3) that Mr. Henderson had asked to speak to him about his concerns; and (4) that a partner he trained was moved to another store and he “perceived it to be so that [he] would be more isolated on the floor.” (*Id.*) In addition, Mr. Bussiere also brought up that he had been “made to drink cold brew with chemicals in it” by his Store Manager.⁵ Mr. Bussiere made clear “I can’t perceive what happened the two days after I called Brian as anything other than retaliation.” (*Id.*) This conversation marked the beginning of a consistent pattern of Mr. Bussiere perceiving random and often innocuous day-to-day actions by company partners as alleged patterns of retaliation.⁶

Mr. Eckensberger and Ms. Cioffi both explained that Mr. Henderson had gone to the store to provide human resources support to Mr. Dragone. (*Id.*) Mr. Bussiere, however, continued to dispute this explanation. (*Id.*) Mr. Bussiere and Ms. Nowakowska also emphasized that they wanted a third-party investigator to look into their concerns. (*Id.*) Mr. Eckensberger told Mr. Bussiere and Ms. Nowakowska that they would discuss their request, and that he was open to the idea. (*Id.*) Mr. Eckensberger and Ms. Cioffi both emphasized that they wanted to maintain an “open dialogue” with partners:

MARCUS ECKENSBERGER: And we want to keep a dialogue with you. (R-1A; R-1B Tr. 49).

⁵ To be clear, there is no allegation nor evidence that could form the basis of an allegation that Starbucks poisoned Mr. Bussiere or Ms. Nowakowska. The General Counsel confirmed: “There’s no allegation that [Mr. Bussiere and Ms. Nowakowska] actually were intentionally like contaminated or anything like that.” (Tr. 131:5-11).

⁶ Other examples of innocuous conduct that Mr. Bussiere misperceived as retaliatory include:

- While he was in a store other than Broad & Washington and a large group of managers walked by, Ms. Hippensteel only waved at him “with no comment to soften the rudeness of her gesture.” (R-29).
- He believed that a manager named “Tracy” was sent to monitor him even though he knew she was at Broad & Washington for a gift-wrapping party for all managers before Christmas and she was there with her nine-year-old daughter. (Tr. 588; R-29).
- A former Store Manager, Allyn Howey, transferred to the Broad & Washington store and Mr. Bussiere interrogated Ms. Howey about the circumstances of her transfer even though she specifically told him that she “had been going through quite a bit in the last few weeks” and had little knowledge of his protest activity. (R-29).

NATHALIE CIOFFI: We have an open dialogue, right? I would ask you only to keep that going. You don't have to -- I think it's great to be open -- for us to be open to talk, and then if we didn't get something right, you want me to fix it? We'll fix it. We will follow the due process to ensure that (indiscernible) everybody has a say, and they'll share whether it's the right thing or if (indiscernible). (R-1A; R-1B Tr. 50:7-15).

MARCUS ECKENSBERGER: We'll get it right. We'll do our best too, but we need to know what's not working for you, and now that we know we ask for an opportunity to investigate and fix it, you know? We'd love your partnership with that. (R-1A; R-1B Tr. 51).

NATHALIE CIOFFI: I hope you don't have to deal with that many people, like you say, my recommend -- don't wait all this time. When you learn something is wrong (indiscernible) just let us know, right? Let us know. Right? Early on, doesn't have to me. It could be Marcus, it could be me, or any of us. Listen, I don't take things personally. Just -- it doesn't have to be such a large volume of things to think that it's valid. (R-1A; R-1B Tr. 51).

When Ms. Cioffi asked if there was anything else Mr. Bussiere and Ms. Nowakowska wanted to discuss, they replied that they wanted a third party to investigate their complaints and that Starbucks could show its good faith by granting their demands, including terminating Store Manager Erin Graves. (R-1A; R-1B). Mr. Eckensberger and Mr. Bussiere then engaged in a short exchange:

MARCUS ECKENSBERGER: But that's -- that is not within our mission and values. So, we want to have an open dialogue with you.

TJ: What about in our mission and values? I'm curious.

MARCUS ECKENSBERGER: Being able to talk to each other, right, and being able to have this type of open dialogue, exactly like we're having now.

TJ: But what if -- what did Echo just say that wasn't in your mission and values?

MARCUS ECKENSBERGER: It -- the demand reply, demand reply is not part of the (indiscernible). We want to have an open dialogue with you so we can have these types of conversations and seek to understand.

(*Id.*)

Ms. Cioffi added that Starbucks was interested in “due diligence” and wanted the opportunity to look into issues that are brought to its attention. (*Id.*) Mr. Eckensberger agreed and added that “If someone was complaining about you, we’d do the same thing, right?” (*Id.*) The parties agreed to meet at a later date for a follow up meeting. (*Id.*) Mr. Eckensberger also asked Mr. Bussiere and Ms. Nowakowska to submit a few recommendations on a third-party investigator for Starbucks’ consideration, but Mr. Bussiere and Ms. Nowakowska never did so. (Tr. 563; 1357).

On June 29, 2019 Ms. Nowakowska, Mr. Bussiere, Ms. Cioffi and Mr. Eckensberger met for a second time at the Broad & Washington store. (Tr. 339). During this meeting, Ms. Cioffi and Mr. Eckensberger told Ms. Nowakowska and Mr. Bussiere that Ethics & Compliance had begun an investigation and provided them with the name of the investigator who would be handling the case. (Tr. 340-41). In addition, Ms. Cioffi and Mr. Eckensberger explained that in response to the demand for the implementation of Fair Workweek, Starbucks was looking into fast-tracking the rollout of the new scheduling app. (*Id.*) Ms. Nowakowska once again recorded the entire conversation between Mr. Eckensberger, Ms. Cioffi, Mr. Bussiere, and Ms. Nowakowska without Ms. Cioffi and Mr. Eckensberger’s prior authorization or consent. (Tr. 297; R-51A; R-51B).

While Starbucks investigated the allegations raised against Ms. Graves, she was placed on leave. Starbucks could not substantiate most of the allegations raised in the Complaint against Graves, but through its investigation did find conduct regarding scheduling and her attendance that was not consistent with its policies and mission. (Tr. 1098-99). Starbucks and Ms. Graves reached agreement that she would resign, and Ms. Hippensteel remained the interim Store Manager while a new, permanent Store Manager was hired and trained. (Tr. 1097).

3. Starbucks's Response to November 25 Demonstration

On November 25, 2019, a group of people appeared at the Broad & Washington store during normal business hours and presented Mr. Dragone with a copy of an unfair labor practice charge. (GCX19). The group was made up of at least five current partners, including Ms. Nowakowska and Mr. Bussiere, as well as former partners and individuals with no obvious affiliation with Starbucks. (Tr. 196). Once again, this demonstration was videotaped and shared on public social media posts. (GCX20-000026-31). The public posts specifically mentioned "Starbucks" and contained the hashtags "#starbucksphiladelphia," "#starbucksphilly," and/or "#starbucks." (*Id.*; GCX-37(g)). After the demonstration at the store Mr. Dragone went to the Broad & Washington store and met with partners to discuss any concerns arising from the demonstration. (Tr. 1027-28).

D. Tristan J. Bussiere's Employment with Starbucks

Mr. Bussiere began working for Starbucks as a Barista in May 2018 at its store located at 16th and Market. (Tr. 317). In January 2019, Bussiere transferred to the Broad & Washington store and worked there until his separation from employment in February 2020. (*Id.*) On August 23, 2019, Mr. Bussiere received a documented coaching from Hippensteel after he arrived an hour late to work. (R-10; Tr. 346-47). On September 16, 2019, Mr. Bussiere received a written warning from Mr. Vaughn, who was aware of the prior August 2019 warning, after he was once again an hour and six minutes late to his 6:00 am shift. (R-11; Tr. 346-47).

1. Mr. Bussiere's Conduct Under Mr. Vaughan

Mr. Bussiere and Mr. Vaughan struggled to work together from the beginning. Mr. Bussiere was "completely standoff[ish]" with Mr. Vaughan and seemed to "not want to interact with" Mr. Vaughan. (Tr. 782). Approximately a week after starting as Store Manager, Mr. Vaughan noticed that stock was not being stored in accordance with the Philadelphia Health Code.

(Tr. 782-83). Mr. Vaughan rearranged the stock to fix the problem, and the next day Mr. Bussiere undid all of his work. (Tr. 782-83).

Mr. Vaughan approached Mr. Bussiere and told him that he moved the stock to comply with the Health Code, and Mr. Bussiere refused to make eye contact with Mr. Vaughan or engage with him in any way. (Tr. 783). Mr. Vaughan asked Mr. Bussiere to put the stock back in its proper place and Mr. Bussiere “walked off and went to the bathroom[.]” (Tr. 783). Mr. Bussiere never complied with Mr. Vaughan’s instruction. (Tr. 784).

Mr. Bussiere would also “badger” Mr. Vaughan about incidents that had happened at Broad & Washington before Mr. Vaughan was the Store Manager and that he had no knowledge of. (Tr. 786). He also attempted to record Mr. Vaughan on his phone even though Mr. Vaughan explicitly told Mr. Bussiere that he did not have his permission to record. (Tr. 786).

Although Mr. Vaughan attempted to connect with Mr. Bussiere on a personal level, Mr. Bussiere remained resistant to Mr. Vaughan’s coaching, turning attempts to coach into a protracted debate. (Tr. 795-96; 798). When Mr. Vaughan would coach the Broad & Washington team, Mr. Bussiere would walk off the store floor as if he did not hear Mr. Vaughan. (Tr. 796).

On September 16, 2019, Mr. Bussiere received a written warning after he was once again an hour and six minutes late to his 6:00 am shift. (R-11; Tr. 346-47). Mr. Vaughn issued a written warning rather than lesser disciplined because he was aware that during his training for store manager Mr. Bussiere had previously been disciplined for the same misconduct in failing to properly and timely notify his store manager about his lateness. Indeed, on August 23, 2019, Mr. Bussiere received a documented coaching after he arrived an hour late to work without notifying his Store Manager, in violation of Starbucks’s time and attendance policy. (R-10; Tr. 346-47). Unfortunately, Mr. Vaughn’s issues with Mr. Bussiere continued.

2. November 21, 2019 Written Warning

In October 2019, Mr. Vaughan repeatedly coached Mr. Bussiere on the need to wear a hat and apron while working at the store in order to comply with health department requirements:

I would come in the store, and TJ would be behind the line, making drinks without a hat, apron on, and I would say something to him, and he would walk off, there were two times, in particular, when I was trying to coach him and explain to him why we needed a hat and apron on, I was trying to explain to him that if the health department comes in, I'm going to get a violation, and then I'm going to get in trouble. And, like, so that's why, like, it's really important, like, this is not a data thing. It's a city thing for the health department. And then he was, like, he walked off as I was trying to explain to him what the violation was and why he needed to have a hat and apron on, the first two times, when I tried to talk to him.

(Tr. 807).

On November 1, 2019, Store Manager Sean Korman came to the Broad & Washington store to pick up cups. (JX-13). While he was at the store, Mr. Korman observed that Mr. Bussiere was on the floor without a hat or apron. (*Id.*) After Mr. Bussiere saw Mr. Korman, he went to the back of the store to put on a hat and apron, leaving the floor unattended. (*Id.*) Mr. Korman emailed Mr. Vaughan to let him know what he had observed. (*Id.*) Mr. Vaughan coached Mr. Bussiere about this issue on the same day. (*Id.*) The next day, Mr. Vaughan arrived at the store, and saw that Mr. Bussiere was once again working without a hat or apron. (Tr. 810).

Mr. Vaughan also repeatedly coached Mr. Bussiere about the pastry case over a period of at least one month. (Tr. 812-813). Mr. Vaughan noticed that whenever Mr. Bussiere opened the store the pastry case would be incomplete. (*Id.*) This would only happen on days in which Mr. Bussiere would work the opening shift at the store. (*Id.*) Whenever Mr. Vaughan attempted to coach Mr. Bussiere on how to prepare the pastry case, Mr. Bussiere would start debating Mr. Vaughan. (*Id.*) On one occasion, when Mr. Vaughan arrived at the store, he observed that the

pastry case was not done. (*Id.*) Mr. Bussiere acknowledged that there were items missing from the case, and that it was his responsibility to complete the case because he was working the opening shift that morning. (Tr. 355). When he asked Mr. Bussiere why the pastry case was incomplete, Mr. Bussiere smiled and said that he would complete the case. (Tr. 812-13). When Mr. Bussiere was done, Mr. Vaughan observed that the turkey bacon sandwich was not in the display. (*Id.*) Mr. Vaughan asked Mr. Bussiere why there were no turkey bacon sandwiches in the display, and Mr. Bussiere responded that they did not have enough sandwiches and started debating Mr. Vaughan. (Tr. 356; 813). Mr. Bussiere claims Ms. Graves directed him not to display items when there was low inventory. (Tr. 355-56). However, at the time of this incident Mr. Vaughan had been the store manager for three months, and had repeatedly instructed Mr. Bussiere to properly stock the pastry case during the opening shift. (Tr. 812). Ultimately, Mr. Vaughan had to put the turkey sandwich in the pastry case himself. (Tr. 813).

Around the same time that Mr. Vaughan noticed that Bussiere was not responding to his coaching regarding the pastry case, he also witnessed Bussiere regularly leaving the sales floor when he was required to be planted at a particular post. (Tr. 814-15). On October 29, 2019, Mr. Bussiere was working on the floor and his area was getting backed up because he would not stay in his planted position. (*Id.*) Mr. Vaughan approached Mr. Bussiere and directed him to stay in his planted position. (*Id.*) In response Mr. Bussiere started debating Mr. Vaughan asking why he was assigned to a particular position, why he needed to be planted, and why other partners were assigned to other positions. (*Id.*) Despite Mr. Vaughan's directive, Mr. Bussiere still left his post, and Mr. Vaughan had to ask Mr. Bussiere to return to his post two more times. (*Id.*) Mr. Vaughan pleaded with Mr. Bussiere, stating "please, like I don't need you to do those things. I'm asking you to stay where I need you to be at." (Tr. 815). However, Mr. Bussiere would not listen to Mr.

Vaughan. (*Id.*) It was important for Mr. Bussiere to stay in the planted position, because it was busy and other partners were trying to take their morning breaks. (Tr. 816).

Prior to this incident, Mr. Vaughan had coached Mr. Bussiere on at least 25 to 30 occasions on staying in his planted position. (Tr. 817). No other partner had to be coached this frequently about staying in a planted position. (*Id.*) When Mr. Vaughan attempted to coach Mr. Bussiere, Mr. Bussiere would start debating for long periods of time about the way things were done at other stores. (Tr. 825-26).

As a result of this repeated, insubordinate conduct, on November 21, 2019, Mr. Bussiere was issued a written warning for failing to meet the expectations of a Barista. (JX-15). Present to deliver Mr. Bussiere's disciplinary notice were Mr. Dragone who would regularly attend discipline as a witness, Mr. Vaughan, and Mike Rose, who at the time was in the interim Partner Resources position. (Tr. 362) The management representatives asked Mr. Bussiere to meet with them in the back of house. (*Id.*) Mr. Bussiere refused to comply and asked to meet with them at the front of the store. (Tr. 362-63). At this point, Mr. Bussiere had already asked certain unidentified individuals to plant themselves in the café to act as witnesses. (*Id.*) The disciplinary notice provided that:

(1) despite being coached on at least two separate occasions about the need to wear a hat and apron while preparing food and drinks, Mr. Bussiere had again failed to wear a hat and apron while preparing food and drinks on November 20, 2019;

(2) despite being coached multiple times about the proper way to stock the pastry case, Mr. Bussiere had failed to display of the breakfast sandwiches;

(3) despite being coached multiple times not to leave the sales floor, on November 16, 2019 Mr. Bussiere again left the sales floor on at least three occasions causing the warming station to be backed up; and

(4) the store manager had been approached by several partners stating that Mr. Bussiere's behavior was becoming a distraction.

(JX-15).

Whereas meetings about corrective actions take approximately ten minutes, the meeting with Mr. Bussiere lasted approximately three hours due to his lengthy questions and discussion. (Tr. 1116). During this meeting, Mr. Dragone shared with Mr. Bussiere that other partners had complained that Mr. Bussiere was distracting them from work:

Q. Do you recall what you said to him with regard to this point?

A. That partners had expressed concern that TJ was distracting them from performing their jobs and helping guests to the point that they felt they needed to voice those concerns to both the store manager and myself because they couldn't get resolution just through the store manager.

(*Id.*)

On November 1, 2019, Mr. Dragone had received an email from Mr. Vaughan, regarding a partner complaint about Mr. Bussiere. (JX-14). Barista Cora Siburt wrote:

On Tuesday, 10/29, our peak was rather tense. While I was busy helping customers, TJ continued to try and distract me by whispering in my ear about drama that was not occurring. I was on the floor with David, TJ, Echo and Gigi the entire time, and TJ claimed David was yelling at them and being negative towards them. Not once did I witness anything happening, other than David connecting with customers and having a good time with us on the floor.

I felt uncomfortable when TJ was pushing me into drama that was not occurring, specially falsely accusing David of words that were never spoken. Our Starbucks always has great energy- but on this specific day, I felt rather uncomfortable and annoyed that there was fake drama occurring when I was just here to do my job.

(JX-14).

Ms. Siburt explained that she sent this email because she was trying to do her job and felt uncomfortable with Mr. Bussiere's approach: "I was just trying to work through and we were

rather busy this morning to my recollection. And I did have, you know, TJ approaching me and while I was trying to stay focused, like whispering in my ear, talking around me, telling me things that were going on, and it's very distracting when, you know, I'm just trying to do my job.” (Tr. 1059-60).

When Mr. Bussiere asked questions about this comment, Mr. Dragone and Mr. Henderson repeatedly directed him to the barista approach and asked him to follow the barista approach. (Tr. 371-72). The barista approach is described in the Partner Guide. This policy encourages partners to contribute to the success of the team and support each other to do their best work. A barista that exemplifies the barista approach: “[b]uilds rapport with partners on shift and displays a positive attitude that enables the team to work together effectively.” (JX5-000011). The parties also discussed an incident that had occurred the prior week where Mr. Bussiere had falsely accused Mr. Vaughan of touching and yelling at him (Tr. 367-68; GCX-8). Mr. Dragone had investigated the incident and after speaking to Mr. Vaughan, Ms. Siburt, and shift supervisor Gigi Hernandez, determined Mr. Bussiere’s accusations were false. (Tr. 1121).

3. Barista Trainer Opportunities at Broad & Washington Store

Around the same time that Mr. Vaughan was dealing with Mr. Bussiere’s performance issues, Mr. Vaughan learned that Mr. Bussiere was certified as a barista trainer. (Tr. 942-43). In October 2019, Mr. Bussiere asked Mr. Vaughan to verify whether he was properly training other baristas at his prior store. (*Id.*) Although Mr. Vaughan knew Mr. Bussiere was a barista trainer, he did not give him an opportunity to train other partners, because “he wasn’t performing his duties the way, properly, the way he was supposed to perform them. So I couldn’t entrust another, a new [partner] to him.” (Tr. 943). Mr. Vaughan has used three baristas to conduct barista training at the Broad & Washington store: Lauren Wainwright, Eddie Hayward, and Andrea Rassul. (Tr. 941). Collectively, these partners have trained four partners, or approximately one partner per person.

(*Id.*).

4. February 6, 2020 Written Warning

On February 6, 2020, Mr. Vaughan issued a written warning to Mr. Bussiere for insubordination. Although Mr. Bussiere had already received a prior warning and progressive discipline supported this one being a final written warning, Mr. Vaughan issued another written warning instead. (Tr. 853). Mr. Vaughan hoped that Mr. Bussiere would improve through the corrective actions. (*Id.*) In particular, the disciplinary notice provided the following examples of Mr. Bussiere's insubordinate behavior:

On 1/18/2020 TJ attempted to go into the back of the store while his store manager, David Vaughn Jr., was conducting a private conversation with another store partner which was of a sensitive nature. This occurred after the SM David and the shift supervisor on duty asked TJ to not do so.

On 1/22/2020 TJ took pictures of the store's punch communication log. TJ took this action despite being specifically told by his store manager not to do so on 1/20/2020. The Daily Records book that the punch communication log is contained within also includes a disclaimer that reproducing it is against policy and that policy is also stated in the Partner Guide.

(JX-17).

On January 18, 2020, Mr. Vaughan had to separate another Broad & Washington partner. (Tr. 1232; JX-17). Ms. Hippensteel was there as a witness. (*Id.*) Mr. Vaughan asked partners not to enter the back room of the store so that he could have some privacy to discuss the separation with the partner. (Tr. 845-46; 1232). Per Mr. Vaughan's request, Ms. Bissell also told partners that once Mr. Vaughan was in the back room, nobody could go back there. (Tr. 1299-1302).

Despite Mr. Vaughan's directive not to enter the back room, Mr. Bussiere attempted to enter the back room two or three times. (Tr. 846-47). Mr. Bussiere pressed Mr. Vaughan with questions; and asked him why partners could not go in the back room, if the partner was being

fired, and why the partner was being fired. (*Id.*) Mr. Vaughan refused to answer any questions responding to Mr. Bussiere that he was free to talk to the partner after their conversation. (*Id.*)

Ms. Bissell stated that all partners working at the time complied with her directive to stay out of the backroom for the time being, except Mr. Bussiere. (Tr. 1302). Ms. Bissell saw Mr. Bussiere leave the floor and enter the back room. (Tr. 1301-02). Ms. Bissell stated “Yes. I saw him -- I didn't see, like, the door being, opened, but I did, like, see him -- because it's a window. So I saw him, like, I guess, getting a cup or getting some supplies for the front, even though we had asked him not to go back there.” (Tr. 1313).

A few days later, there was another incident with Mr. Bussiere. Starbucks maintains a daily records book which contains partner's time punches, sick leave usage, personal time-off usage. (Tr. 848). This book is used by the shift supervisors in order to communicate with one another between shifts. (*Id.*) In addition, the book contains a section that includes topics discussed solely by the Store Manager and the District Manager. (*Id.*) On January 20, 2020, Mr. Bussiere attempted to take a picture of the sick log and time punch log in the day records book. (Tr. 848). Mr. Vaughan told Mr. Bussiere that he could not take a picture of these logs, because they contained other partner's personal information. (*Id.*) Despite being instructed not to take pictures of the daily records book, Mr. Bussiere took pictures of the book on January 22, 2020. (*Id.*)

5. Mr. Bussiere's Interactions with Ms. Bissell

Ms. Bissell and Mr. Bussiere also struggled in their interactions during Mr. Bussiere's employment. (Tr. 1283). Mr. Bussiere would not follow instructions and often find reasons to challenge Ms. Bissell in her role as new shift supervisor. (*Id.*) Mr. Bussiere would follow Ms. Bissell around the store and try to find everything that she was doing wrong. (*Id.*)

On February 17, 2020, Mr. Bussiere was working the warming station. Ms. Bissell observed that Mr. Bussiere was leaning on the counter talking to a partner who was working in the

store for the day. (Tr. 1284-86; R-45). While talking to the partner, Mr. Bussiere was not performing his assigned tasks. (Tr. 1288). Instead, Ms. Bissell could hear that Mr. Bussiere was talking about “negative topics” including customer incidents at another store and his lawsuits against Starbucks. (Tr. 1306; R-45). The store Mr. Bussiere was speaking about was not the visiting partner’s store. (*Id.*)

Ms. Bissell observed that Mr. Bussiere’s behavior was impacting the environment at the store, and she felt that it needed to be addressed. (Tr. 1308). Ms. Bissell was a new supervisor and did not know how to address Mr. Bussiere about this issue:

But this is the kind of -- I was a new supervisor. So like what we call coaching partners wasn't very, like, comfortable for me. I think that's why I [sought] guidance for David. I didn't necessarily know, like, what we should and shouldn't be doing. But if it was affecting the environment and other store partners complaining, then I think it was something that needed to be addressed

(Tr. 1308).

Ms. Bissell texted Mr. Vaughan and asked him if she could speak to Mr. Bussiere. (Tr. 1307; GCX-48). In response, Mr. Vaughan told Ms. Bissell that she had the right to speak to him about having positive energy and conversations, and that conversation on the floor should align with Starbuck’s mission and values. (*Id.*) Ms. Bissell followed Mr. Vaughan’s instructions and told Mr. Bussiere “that while on the floor and clocked in to have positive conversations that align with Starbucks morals and missions but on his own time of course can do/say whatever.” (R-45). Mr. Bussiere pulled out his notebook and started taking notes, he told Ms. Bissell that she could not tell him what to say. (Tr. 1289).

Ms. Bissell sent an email to Mr. Dragone summarizing the conversation she had with Mr. Bussiere. (R-45). Mr. Dragone responded with some questions about the incident, to which Ms. Bissell replied as follows:

- Was TJ on duty during these conversations? *Yes was clocked in and on the floor*
- Was he affecting customer service and operations? *Yes Was not engaging in positive greetings to customers it was early in the morning so we were super busy but still was not positive from the beginning of shift*
- Was he distracting other partners on duty from doing their job? *Yes was leaning on counters and talking about these which had other [partners] leaning on counters engaging/not staying busy with tasks even after me asking them to work on some tasks*

(R-45) (emphasis added).

On February 19, 2020, Mr. Bussiere approached Mr. Vaughan with the purpose of recording his response to Mr. Bussiere's questions about the incident with Ms. Bissell. (Tr. 454-55). Mr. Bussiere, who initiated the conversation, did not tell Mr. Vaughan that he was recording the conversation. (*Id.*) Unbeknownst to Mr. Vaughan, Mr. Bussiere recorded the entire exchange between them. (*Id.*) During this conversation Mr. Bussiere told Mr. Vaughan that Ms. Bissell told him that he could not say anything negative about Starbucks management and asked if it was true. (GCX-12A; GCX-12B). Mr. Vaughan responded:

Party 2: Whenever you're [a partner] you're supposed to be having upbeat conversations that align with Starbucks's missions and values. Part of your— When you clock in, you agree to work in a manner that align with Starbucks's mission and values. So, whatever it is that you're doing or saying needs to align with that because that's part of what you signed up to do.

Party 1: Okay. But if I'm talking about, like, the workplace, and if it's, like—

Party 2: If there's something specifically going on in the store, and the other partners— and you guys wanna talk about it, specifically, then that's fine. You can't bring out drama from another store, and negativity, drama about other people and other managers in the same room of one store, where you're talking (inaudible), talking to the customers, (inaudible), because what you're doing is causing just a realm of unnecessary drama.

(GCX-12A; GCX-12B).

On the same date, Ms. Bissell attempted to rollout a new break policy asking partners to use a timer to track their ten-minute breaks. (R-33). Mr. Bussiere was resistant to this change. When Ms. Bissell told him that she would be timing his break, as she had the other partners, Mr. Bussiere tried to grab the timer from her hand and take the timer with him to the back of the store where she could not access it. (Tr. 1290-91). After Ms. Bissell attempted to coach Mr. Bussiere about keeping the timer at the front of the store, Mr. Bussiere told Ms. Bissell “make sure to let me know when you go on break so I can time you.” (Tr. 1318). Once again, Ms. Bissell felt defeated and like she could not do her job. (*Id.*)

6. Mr. Bussiere’s Termination

On or about February 16, 2020 Mr. Bussiere was at the store talking to Starbucks partner Simon Allen. (Tr. 459-60). During this conversation, Mr. Bussiere told Mr. Allen that he had heard a rumor that Ms. Siburt had said that Mr. Allen was next to be fired. (Tr. 460). Mr. Allen was surprised by Mr. Bussiere’s revelation. (*Id.*)

On or about February 19, 2020, Mr. Allen confronted Ms. Siburt about what Mr. Bussiere had told him about her saying that Mr. Allen was going to be fired. (Tr. 1063). Ms. Siburt denied this allegation, and Mr. Allen told Ms. Siburt that he had heard the rumor from Mr. Bussiere. (Tr. 1064). On February 19, 2020, Ms. Siburt sent an email to Mr. Dragone and Mr. Vaughan expressing her concerns about the incident. (JX-18). In the email she denied having made any statements about Mr. Allen’s potential termination, and described the impact the rumor had on herself:

This morning at work, I was very hurt to know that even though I do my job, I am happy, I am successful, and have good connections with all of my fellow baristas, that I still was drug into drama that I

absolutely have no part of. I tried to avoid it by not talking to TJ at all, and I STILL am being pulled into this negative hole.

(JX-18).

Ms. Siburt also discussed the impact Mr. Bussiere was having on her coworkers:

I've never felt sad or betrayed, but today I did. I also watch my coworkers alongside me feel the same way. We are all slowly being pulled down. Leanne even had a panic attack this morning in the back when TJ tried to instruct her on how to do HER job. I hate the way I've been feeling, but most importantly, Im very upset to see the way all of my partners are being affected as well.

....

And I love David, and the baristas whom I work with. And to see them all breaking down slowly and struggling to remain happy and positive just because of one person is heart breaking to me. We are a strong team. I know we are. But it's becoming harder and harder for us to remain calm and feeling safe here.

(*Id.*)

Following Ms. Siburt's email, Starbucks opened an investigation into this incident, and spoke to Mr. Allen and Ms. Siburt to confirm the aforementioned facts. (Tr. 1372). Although Starbucks attempted to reach Mr. Bussiere to obtain his version of the events, Mr. Bussiere refused to participate in the investigation process. (*Id.*) On February 20, 2020 Starbucks called Mr. Bussiere to investigate the allegations made by Ms. Siburt. (Tr. 462). Mr. Bussiere answered the call and hung up when he heard the person was calling from the Partner Resources Center. (*Id.*)

Mr. Eckensberger ultimately made the decision to terminate Mr. Bussiere, because he intentionally lied to another partner and was not treating other partners with respect and dignity. (Tr. 1375). Mr. Eckensberger considered Mr. Bussiere's disciplinary history with Starbucks prior to issuing the termination as well as the impact his continued behavior had on the other partners in the store. (Tr. 1374-75). On the morning of February 26, 2020, Starbucks accordingly terminated

Mr. Bussiere's employment for knowingly spreading a false rumor about the Store Manager's intentions to fire another partner. (JX-19;Tr. 458).

E. Echo Nowakowska

Starbucks hired Echo Nowakowska as a Barista on December 4, 2018 at its 20th & Market store. (Tr. 106). Ms. Nowakowska transferred to the Broad & Washington store in January 2019 and worked there until January 2020.

1. Ms. Nowakowska's Conduct Under Mr. Vaughan

Unlike Mr. Bussiere, Ms. Nowakowska initially had a good working relationship with Mr. Vaughan. (Tr. 782). Ms. Nowakowska and Mr. Vaughan would interact as he did with other partners and have short conversations in the workplace. (*Id.*)

Mr. Vaughan testified, however, that after he was at the Broad & Washington store for a few weeks, Mr. Bussiere and Ms. Nowakowska both approached him and asked him what he would do if someone disrespected a transgender partner in the store. (Tr. 787). Mr. Vaughan testified that while he was responding to their questions, Ms. Nowakowska tried to record him. (Tr. 788). When Mr. Vaughan tried to end the conversation, Ms. Nowakowska threatened to call the NLRB, because she did not like his response. (Tr. 789).

2. October 29, 2019 Written Warning

In October of 2019, Mr. Vaughan Jr. verbally coached Ms. Nowakowska about her customer service skills and her tendency to "slam" cups down on the counter. (Tr. 864-65). Mr. Vaughan stated:

Q. And what was the nature of the coaching that you provided.

A. Just, hey, Echo, you know, when you put the drinks down, try not to slam them. You know, I even said, hey, just maybe if you just put it on the counter and kind of, like, glide it forward or whatever, so -- because I didn't know, like, you know, why she was

slamming the cup down. So I just kind of gave her pointers on other ways to, like, handle the cups and the customers.

(Tr. 865)

Ms. Nowakowska did not ask any questions during this coaching.

On another occasion, Mr. Vaughan observed that there was a drink sitting in the counter at the bar area, and he approached Ms. Nowakowska to ask if she had called out the drink to the customer. (Tr. 866). When Mr. Vaughan asked her to call out the drink again in case the customer did not hear her, Ms. Nowakowska replied “me well maybe if she wasn’t talking that she would have saw the drink. I called it out already.” (*Id.*) Ms. Nowakowska became combative with Mr. Vaughan, so Mr. Vaughan called out the customer’s name and gave her the drink. (Tr. 866-67). When Ms. Nowakowska asked Mr. Vaughan to show her how he wanted the drink handoff to be handled, Mr. Vaughan modeled drink hand-off for her stating: “pick the cup up and turn it over to the customer, and say, like, I said a name, I think I used my name or her name as an example, say, so it’s just, your drink is here, you know, you want to hold it up and hand it like that.” (Tr. 867).

Mr. Vaughan also spoke to Ms. Nowakowska about other recurrent customer service issues, including her interactions with a specific customer Ms. Nowakowska did not like. When the customer visited the store, Ms. Nowakowska would roll her eyes and complain about the customer’s drink and the customer’s requests. (Tr. 868-69). Mr. Vaughan spoke to Ms. Nowakowska about her customer service issues and explained that they are in the business of customizing drinks for customers, and that he had observed her “bang the cup down” on two different occasions.” (Tr. 869).

Shift supervisors Gigi Hernandez and Leanne Bissell also observed Ms. Nowakowska being rude to customers and slamming cups. Mr. Vaughan testified that that Ms. Hernandez

reported to him that Ms. Nowakowska was being rude to customers and slamming cups on seven or eight occasions. In addition, Ms. Bissell also reported to him that Ms. Nowakowska was slamming cups two to three times. After hearing about these recurring issues and speaking to Ms. Nowakowska on three separate occasion, Mr. Vaughan decided to issue a corrective action to Ms. Nowakowska's poor customer service and the fact that she was not receptive to coaching. (Tr. 869). Mr. Vaughan stated: "I felt like I needed to document it at this point because she was not receptive to the coaching, and not only was she not receptive, but she was combative about it." (Tr. 867).

On October 29, 2019, after consulting with his District Manager Mr. Dragone, Mr. Vaughan issued a "Written Warning" to Ms. Nowakowska. (JX-7; Tr. 872). The disciplinary notice provided:

On 10/23/19 Store Manager observed Echo slam a beverage on the handoff counter. Echo did not call the beverage out using the name, nor did she say thank you or try to connect with the customer-all of which are expectations of a barista. The customer who ordered drink was standing in front of Echo; the store mgr had to apologize to the customer since she was visibly upset. The Store Manager coached Echo in the moment.

On 10/29/19 the SSV on duty, GiGi, coached. Echo on connecting with customers and properly handing out beverages & not slamming them down, making eye contact, thanking the guest.

On 10/29/19 the store mgr again coached Echo two additional times about saying hello to our guests, making connection with customers and not slamming beverages on the counter.

(JX-7).

Mr. Vaughan decided to issue a written warning because he had already had multiple conversations Ms. Nowakowska about the same topic, and her customer service incidents were an ongoing occurrence. Mr. Vaughan stated "I was afraid that if I continued to let that go, that the next, the other [partners] may start to do it, and then it's going to be a trickle down effect. And as a leader,

how could I just be stand by and continue to watch somebody do those things?”(Tr. 895). Unbeknownst to Mr. Vaughan and Mr. Dragone, and without their prior authorization, Ms. Nowakowska recorded the entire exchange between Mr. Vaughan, Mr. Dragone, and herself. (Tr. 178).

3. Ms. Nowakowska’s December 2019 Coaching

On November 27, 2019, Mr. Vaughan observed multiple guests waiting for food. JX9. Mr. Vaughan went to the warming station and observed that Nowakowska was not following the established warming routing because she was not using both ovens and was not delivering food to customers when it was finished. (*Id.*; JX-8). Mr. Vaughan attempted to coach Nowakowska on the proper sequence for warming food, but she ignored the coaching and did not respond. (*Id.*) Later on during the same shift, the warming station backed up again and the shift supervisor coached Ms. Nowakowska, but again, Ms. Nowakowska was unresponsive, and customers continued to wait for food. (*Id.*) When Vaughan attempted for a second time to coach Nowakowska on the proper warming routine, Ms. Nowakowska raised her voice to Mr. Vaughan and loudly stated “David, I heard you the first time.” (*Id.*) Despite Ms. Nowakowska’s recurrent issues on this date, Mr. Vaughan did not issue discipline to Ms. Nowakowska. (Tr. 1045-46). Instead, on December 18, 2019, Mr. Vaughan and Ms. Hippensteel met with Ms. Nowakowska to discuss the “sequencing warmed food” policy and the policy on “how we communicate.” (GXC-23; GCX-24).

4. Ms. Nowakowska’s Termination

On or about January 16, 2020, Ms. Nowakowska had another incident of poor customer service. (JX-12). Cora Siburt testified that while she was working with Ms. Nowakowska a regular customer asked for light ice in her drink and Ms. Nowakowska, who was preparing her drink,

developed an attitude and starting “slamming drinks down on the counter.” (Tr. 1067). Ms. Siburt stated that when the customer started to get visibly angry, Ms. Nowakowska told her to “make the drink herself” and left the floor. (*Id.*) Ms. Siburt was left alone working on the bar. (Tr. 1070-71). Ms. Siburt also testified that the other customers were close by and she believes they overheard the interaction. (Tr. 1069-70). On January 24, 2020, Ms. Siburt also sent an email to Mr. Vaughan recounting the event:

The other morning, I was on bar with Echo, and a customer was very particular about her order, asking for lighter ice. Echo did not take this well, as she asked the customer if she would like to make it herself, and continued to make snarky comments and yell at her, face to face. This causes a scene, where many other customers were watching, and I did not know how to handle the situation.

(JX-11).

When asked why she sent this email to Mr. Vaughan, Ms. Siburt responded “The situation put me in a very uncomfortable spot, and it made me feel singled out, even though it wasn't, you know my fault. It just made me feel very uncomfortable.” (Tr. 1072). Ms. Nowakowska confirmed that she serviced this customer, but denies that she had a negative exchange with the customer. (Tr. 222).

On January 22, 2020, Shift Supervisor Leanne Bissell witnessed another customer service incident involving Ms. Nowakowska. (JX-10). Ms. Bissell was in the warming station and heard Ms. Nowakowska arguing with a customer:

[Ms. Nowakowska] was on register and was -- had a back-and-forth conflict with this man customer, and I walked over to see if I could help sort out the problem. And basically she was just refusing to give the customer his request, saying it wasn't policy. This customer was getting very annoyed and aggravated. So I chose to just give him the tea bags to try and make the moment right. That's, like Starbucks' policy. And she continued to try to, like, go back and forth with him and then myself in a very, like angry tone.

And then he asked for a pack of butter, which we give away for free. And she turned around to him and said in a very, like, aggressive tone, and now you're trying to get free butter. And he got very upset by this, obviously, saying that it was really bad customer service and that she wouldn't be able to, like, talk to people like that, in that tone, and it was a very aggressive encounter.

(Tr. 1295-96).

The next day, Ms. Bissell described the incident in an email to Mr. Dragone:

The customer turned to me and explained that all he was asking was that he wanted to take the two tea bags that would come free to him with the purchased refill tumbler he bought and had with him (as he wanted the tea bags for later during work). I said that is totally okay and we can definitely do that for him (as a just say yes policy should be followed in this situation.) the tea bags were handed to the customer and I apologized for the inconvenience of this interaction meanwhile echo was continuing to say to me that this wasn't the policy and it had to be poured in the cup. I stated that not pouring the hot water and just giving him the tea bags is not going to be a problem. The same customer then asked for a pack of butter (which yes usually comes with a purchased bagel but after this interaction a pack of butter was definitely not a problem to give to this customer) echo then said to the customer "now you're trying to get butter for free also" the customer and I were appalled by this comment and the customer was very upset saying that she shouldn't be talking to customers that way and that she needed to adjust the way she's talking to people he also commented that he wasn't trying to get anything for free as he paid 40 dollars for the tumbler.

This all happened with multiple customers in line. I tried to resolve it and apologize to the customer as much as possible. Echo continued to try to talk about him to me in front of other customers once I took over register for her. I nicely told her that we can talk about this later in the back room once we finishing helping the line of customers. She said "no we can talk about this now" taken back with her pushback, as the shift, I responded "no we will talk about this after".

(JX-10).

Following this incident, the customer also approached Mr. Vaughan to discuss the incident, and expressed to him that he did not like the way he had been treated by Ms. Nowakowska. (Tr. 896).

Mr. Vaughan assured him that he would handle the situation. (*Id.*).

Ms. Nowakowska confirmed this customer interaction took place. (Tr. 223-26). Ms. Nowakowska testified that she engaged in “back and forth” with the customer over whether he could get the tea bags he requested. (Tr. 224). Eventually, when Ms. Bissell stepped in to help, Ms. Nowakowska confirmed stopped arguing with the customer, testifying: “I didn’t feel like arguing with him anymore to be honest, so I go to get him the tea bags, and after he says he wants two pads of butter.” (Tr. 224-25). Ms. Nowakowska also confirmed that she stated, “now you want the butter.” (Tr. 225). When asked why she had said to the customer “now you want the butter” Ms. Nowakowska replied that she felt exasperated. (*Id.*). Ms. Nowakowska also confirmed that there were other customers present. (Tr. 226).

Based on these two incidents, Mr. Vaughan approached Mr. Dragone about terminating Ms. Nowakowska’s employment. (Tr. 891). Although Mr. Vaughan could have made the decision to terminate Ms. Nowakowska’s employment on his own, he approached Mr. Dragone because he wanted to make sure that he was making the right decision. (Tr. 891-92). Mr. Vaughan was concerned about making the wrong decision, because Ms. Nowakowska and Mr. Bussiere had threatened him with going to the NLRB, and he was scared that he would lose his job like the prior Store Manager. (Tr. 892). Mr. Vaughan testified that he was so scared of saying the wrong thing or doing the wrong thing that he “saved the Corrective Actions for when there was times where, like, okay, like, enough is enough, like, my hands are completely tied. (Tr. 892-93). Ultimately, the decision to terminate Ms. Nowakowska was made by Mr. Dragone in conjunction with partner resources. (Tr. 1136). While the district managers will typically make decisions about partner termination on their own, Mr. Dragone explained that due to the preceding unusual set of circumstances he wanted to make sure to received objective input and scrutiny on how to proceed. (Tr. 1137). On January 26, 2020 Ms. Nowakowska was terminated by Starbucks. (JX-12).

Although Ms. Nowakowska had the opportunity to contest her separation, she did not do so. (Tr. 1138).

5. Ms. Nowakowska's Scheduled Hours of Work

Starbucks's scheduled hours of work are based on the forecasted budget and customer traffic. (Tr. 1126-30). When a new store is opened, Starbucks will write the schedule over the forecast budget in order to try to grow the store's potential for sales. (*Id.*) The Broad & Washington had recently opened and was operating over the forecasted budget. However, in September of 2019, the stores hours were adjusted to meet the forecasted budget. (*Id.*) Schedules are posted three weeks in advance, so these changes first appeared at the end of October 2019. (Tr. 184; 900-01). Ms. Nowakowska testified that her scheduled hours of work were reduced in November and December of 2019. (Tr. 183). She claims that her scheduled hours were reduced from 34 hours per week to 19 hours per week. (Tr. 183-84). In November 2019, Nowakowska's hours (112) were in line with multiple other baristas including: Paige Aikens (118); Edward Puig (115); and Andrea Rusili (119). Similarly, Ms. Nowakowska's December 2019 hours (88) were similar to other baristas, including Andrea Rusili (95), Kiheem Ayers (61), and Christine Kirchner (51). (R-40.)

Mr. Vaughan explained that Ms. Nowakowska's reduction in hours coincided with a storewide reduction in hours based on the store's customer volume:

So previously, before I took over the store, there was a business investment made by Starbucks where they were allowing stores to use a lot more hours than they were earning as far as number-wise, but that came to an end in September. And so a lot of the stores and most of the partners were used to being on the floor with overstaffed, and, like, you know, it was just overstaffed, and the customer volume wasn't there, but it was just a bunch of people on the floor.

And so that came to an end. So, like, right around late September, when that started coming to an end, September, October, I had to pull back those hours, because when I first took over the store, I noticed they were using so much more hours than they needed. They were using a lot of hours.

(Tr. 901).

Ms. Nowakowska alleges that Mr. Vaughan told her that her hours of work were reduced due to her workplace performance. (Tr. 185). Ms. Nowakowska claims that Mr. Vaughan told her that if her performance improved, he would give her more hours, and that when Ms. Nowakowska asked how she could improve her performance, Mr. Vaughan referred her to the written warning she had received on October 29. (Tr. 185-86).

On or about September 24, 2019 Ms. Nowakowska secretly recorded a conversation between Mr. Vaughan and herself regarding customer service. (R-2A; R-2B; Tr. 276-77). During this conversation Ms. Nowakowska brought up that her hours were “light.” Mr. Vaughan explained that if she improved her customer service skills, she would get additional hours of work:

DAVID VAUGHN: But listen, if you come here and give me 30 hours' worth of legendary customer service, that's what you're going to have all the time.

ECHO NOWAKOWSKA: What about 35? Because I need 35.

DAVID VAUGHN: If you come in and give me 35 hours' worth of --

ECHO NOWAKOWSKA: Okay.

DAVID VAUGHN: -- legendary customer service, you will have no problem with it. Because in my mind, I'm going to say, well, Echo comes here every time, every time she's here, she makes sure that my customers are happy, makes sure that the systems are being in place, and make sure that -- so why wouldn't I want you here 20 for 35 hours?

(R2A; R2B). In addition, Mr. Vaughan explained that he was not going to schedule people who were not giving Starbucks great customer service. (*Id.*) Mr. Vaughan testified that this approach was consistent with how he would approach all partners, not just Ms. Nowakowska. (Tr. 903-04). Significantly, the recording does not contain any mention of any discipline related to Ms. Nowakowska. (R2A; R2B).

Mr. Vaughan also testified that he tried to offer Ms. Nowakowska additional hours. (Tr. 899). Mr. Vaughan testified that he was looking for a partner to work the available night shift, so he approached Ms. Nowakowska with the opportunity to work the shift. (*Id.*) Ms. Nowakowska would have received more hours had she worked the night shift. (*Id.*) Ms. Nowakowska asked for some time to consider the offer. (*Id.*) When Mr. Vaughan later asked her if she was interested in the shift, Ms. Nowakowska declined the opportunity and stated that she would rather not work the evening shift. (*Id.*) Ms. Nowakowska confirmed that she had declined opportunities to work the closing shift on multiple occasions when she had another engagement. (Tr. 255). In addition, Ms. Nowakowska asked if she could pick up shifts at other locations. (Tr. 899). Mr. Vaughan agreed to this request. (*Id.*) It is undisputed that despite her scheduled hours, Ms. Nowakowska was able to pick up shifts in other locations whenever she wanted. (Tr. 183-84; 899).

Ms. Hippensteel testified that shortly after the Broad & Washington store opened, there was a reduction in hours for all partners, and that Ms. Nowakowska contacted Ms. Hippensteel to request additional hours of work. (Tr. 1237). Ms. Hippensteel and Ms. Graves arranged Ms. Nowakowska's schedule so that in addition to working at the Broad & Washington store, Ms. Nowakowska could also work in Ms. Hippensteel's store two days per week and pick up additional hours. (*Id.*) This arrangement continued while Ms. Graves was the Store Manager at the Broad & Washington store. (Tr. 1238). When Mr. Vaughan became the Store Manager, he was not notified of the prior scheduling arrangement. (Tr. 1239). Although Ms. Nowakowska claims her hours were reduced in October of 2019, Ms. Nowakowska did not request to pick up additional shifts at Ms. Hippensteel's store. (Tr. 1238-39).

In explaining her schedule changes, Ms. Nowakowska appears to connect her alleged hours reduction with her allegation that on or about October 22, 2019 a Starbucks manager from the 34th

and Walnut location appeared at a union meeting. (Tr. 154-56). Ms. Nowakowska stated that she requested that the manager leave the meeting. (*Id.*) Former 34th and Walnut location partner Diente Fo explained that he invited both of his managers to the meeting, and that at the time he believed it was a meeting to discuss how to change Starbucks' policies as they applied to him. (Tr. 491). However, at the meeting Mr. Fo realized that the topic of the meeting was actually how to organize in a workplace. (Tr. 485-86). Mr. Fo also explained that once the manager realized what was happening at the meeting, the manager left. (Tr. 492). There is no evidence that the Store Manager shared this experience with any managers at the Broad & Washington store, or that any of the relevant decision makers with regard to the decisions at issue with Ms. Nowakowska's employment were aware of this meeting.

F. Jean Hippensteel and Sean Korman's visit to the Broad & Washington Store

Approximately, once or twice per month Ms. Hippensteel would visit the Broad & Washington store to meet with Mr. Vaughan or with other Store Managers, in order to provide them support as new managers. (Tr. 1227-29). Those managers included Hannah Waddell, Kuya Diaz, Sara Cassis, and Sean Korman. (Tr. 1230). Ms. Hippensteel would typically meet with Mr. Korman at the Broad & Washington store, because the store was in close proximity to both of their stores and there was seating available. (Tr. 1242).

On January 29, 2020, Ms. Nowakowska went to the Broad & Washington store to meet Mr. Bussiere for lunch. (Tr. 227). Ms. Nowakowska was no longer a Starbucks partner on this date. (JX-12). Ms. Nowakowska sat down at the community table, which is a long table located in the front of the store. (Tr. 227-28, 1244). Ms. Hippensteel walked into the store a few moments later. (Tr. 227-28). After she arrived, Sean Korman, the Store Manager for Broad & Jackson also arrived at the store. (*Id.* at 228). Mr. Korman sat in the community table with Ms. Nowakowska.

approximately 6 feet apart from her. (Tr. 229). The large table is called the community table, because people will sit together at the table, sometimes even if they are not part of the same group. (1244-45). At some point, Mr. Bussiere also finished his shift and sat at the table with Ms. Nowakowska. (Tr. 228).

Ms. Hippensteel sat down next to Mr. Korman and began having a conversation with him about the Global Month of Good activities they have been working on together. (Tr. 229; 1245). Ms. Hippensteel and Mr. Korman sat at the table for less than an hour. (Tr. 1247). Mr. Bussiere and Ms. Nowakowska were “scrolling through pinterest and instagram together” while Ms. Hippensteel and Mr. Korman talked. (R30, p. 5; Tr. 445).

G. Store Manager Navy Ros

Starbucks manager Navy Ros has worked for Starbucks for over 15 years, and is currently assigned to the Penn Medicine Perelman Center. (Tr. 672-74). In 2019, Mr. Bussiere picked up a shift at Ms. Ros’ store. (Tr. 674). When Mr. Bussiere shared that he was from the Broad & Washington store, Ms. Ros remembered she had seen him in the news. (Tr. 675). Ms. Ros was generally aware of the events at the Broad & Washington store, because she had seen a newspaper publication discussing the store. (Tr. 676-77).

A couple of days prior to December 6, 2019, Ms. Ros saw Mr. Dragone and shared with him that a copy of the article featuring Mr. Bussiere had been posted at her store without prior approval, and that Mr. Bussiere had worked at her store. (Tr. 690, 683-84). At the time. Mr. Dragone was covering for Ms. Ros’ district manager. (Tr. 688). On December 6, 2019, Mr. Dragone emailed Ms. Ros and asked her to send him information about the events that had transpired at her store. (GCX-36). On or about December 13, 2019, Ms. Ros responded to Mr. Dragone’s email. (*Id.*) Ms. Ros explained:

I slid off the floor and I was getting ready to leave. Before I did, I quickly worked on organizing some product in the back room, but I could hear TJ *out front* asking my SSV Suvi some questions. What I heard was them discussing Fair Work Week. He asked Suvi what she knew about it. She told him that she only heard a little about it so far, but she knew that we had to make sure that partners clock in and out on time.

(*Id.*) (emphasis added).

Ms. Ros testified that at her store the “back line” is L-shaped and partners have to walk past the espresso behind the line in order to get to the back room. Although there is a door separating the back room and front of the store, Ms. Ros testified that the door is normally open at her store. (Tr. 686). In addition, Ms. Ros shared that she had interviewed her shift supervisor and asked her “how the rest of the night went and how she felt about working with TJ.” (GCX-36).

III. LEGAL STANDARD

The General Counsel has the burden to prove by a preponderance of the evidence the facts sufficient to show alleged violations of Section 8(a)(1) and 8(a)(3) of the Act. 29 U.S.C. § 160(c) (stating that violations of the Act can be adjudicated only “upon the preponderance of the testimony” taken by the NLRB); 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof”). The General Counsel cannot sustain its burden of proof by only discrediting any of Starbucks’s evidence. *Keller Mfg. Co.*, 272 NLRB 763, 766 (1984). Rather, in order to prevail, the General Counsel must support its case with substantial evidence and Starbucks must fail to counter with affirmative evidence of its own. *Id.* In this case, the General Counsel has not met this burden and the claims should be dismissed.

A. Legal Standard for Section 8(a)(1) Interference Claims

Section 8(a)(1) of the Act forbids employers to “interfere with, restrain or coerce” employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). Section 7,

meanwhile, establishes the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. The Board's well-settled test for determining a Section 8(a)(1) is “whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightways Co.*, 124 NLRB 146, 147 (1959). Although the Board applies an objective standard, there are situations where motive and probable success or failure of the coercion may be considered. *See Keith Miller*, 334 NLRB 824, 830 (2001). The General Counsel bears the ultimate burden of proving interference, restraint, or coercion in violation of the Act.

B. Legal Standard for Section 8(a)(1) Interrogation Claims

Interrogating a partner about their union support, sympathies, or activities violates Section 8(a)(1) of the Act if, under the totality of the circumstances, the questions would have a reasonable tendency to restrain, coerce or interfere with Section 7 rights. *Rossmore House*, 269 NLRB 1176, 1177-78, n.20 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985) (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)). In evaluating the questioning, the Board considers factors, such as: (1) the background or context in which the questioning occurs; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply. *See McClain & Co.*, 358 NLRB 1070, 1072 (2012), *see also Camarco Loan Mfg. Plant*, 356 NLRB 1182 (2011); *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004). These factors are not to be “mechanically applied” and it is not essential that every element be met. Reasonable tendency is an objective standard and,

therefore, does not turn on whether there was actual intimidation. *Multi-Aid Service*, 331 NLRB 1126 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001).

C. Legal Standard for Section 8(a)(1) Surveillance Claims

Section 8(a)(1) of the NLRA provides that it is a violation for an employer to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. 29 U.S.C § 158(a)(1). Routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance. *Aladdin Gaming, LLC.*, 345 NLRB 585, 586 (2005). An employer only violates Section 8(a)(1) when it surveils employees by observing them in a way that is “out of the ordinary” and thereby coercive. *Id.* “Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation.” *Id.* Ultimately, the test is an objective one and involves a determination as to whether the employer's conduct, under the totality of the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7. *Sage Dining Servs., Inc.*, 312 NLRB 845, 846 (1993); *Brown Transp. Corp.*, 294 NLRB 969, 971-972 (1989).

Not all instances where employer representatives are “at or in the vicinity of the union activities of their subordinate employees amount to unlawful surveillance.” *P.V.M.I. Assocs.*, 328 NLRB 1141, 1142 (1999); *Gossen Co.*, 254 NLRB 339, 353 (1981), modified on other grounds. Moreover, the Board has long held that an employer’s observation of open union activity on or near its property does not constitute unlawful surveillance. *Impact Indus.*, 285 NLRB 5, n.2 (1987); *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986).

D. Legal Standard for Section 8(a)(3) Claims

The Act prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). The Board has established a causation test for analyzing alleged violations of Section 8(a)(3) of the Act. *Wright Line Inc.*, 251 NLRB 1083, 1089 (1980). To establish the initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show activity exists that is protected by the Act. Second, the General Counsel must prove that the respondent was aware that the partner in question engaged in such protected activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the partner's protected activity and the adverse employment action. *River Falls Healthcare, LLC d/b/a Kinnic Health & Rehab and United Food and Commercial Workers, Local 1189*, 2014 WL 3347515 (NLRB July 7, 2014). Further, “[i]f the government does not prove all four elements, it has not established a violation and the case must be dismissed.” *In Re Mississippi Action for Progress, Inc.*, 2002 WL 31386007 (NLRB Oct. 18, 2002).

“[I]n the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred.” *CEC Chardon Elect.*, 302 NLRB 106, 107 (1991). Without proof of employer animus, it is irrelevant whether the employer would have taken that action absent protected activity. *See e.g., Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993) (“[b]ecause we find that the evidence does not support a finding of retaliatory motive, we need not decide whether the Respondent established that it would have laid the pilots off and discharged them even if they had not engaged in protected activities”). “Although Respondent's reasons for its actions are not free

of doubt, the Board has observed that even when the record raises ‘substantial suspicions’ regarding employee discharges, the General Counsel is not relieved of ‘the burden of proving that Respondent acted with an illegal motive.’” *Yusuf Mohamed Excavation*, 283 NLRB 961, 963-64 (1987) (citing *Affiliated Hosp. Prods.*, 245 NLRB 703, n.1 (1979)); see also *CEC Chardon Elec.*, 302 NLRB at 107.

If the charging party meets this initial burden, only then does the burden shift to the employer to rebut the prima facie case, by demonstrating a legitimate, nondiscriminatory motive for its actions. See *Upper Great Lakes Pilots*, 311 NLRB at 136; *Wright Line*, 251 NLRB at 1089. It is not for the Region or the Board to evaluate whether the reasons asserted make sound business sense. An employer need show only it was honestly motivated by legitimate, non-discriminatory business reasons. *Ryder Distrib’n Res., Inc.*, 311 NLRB 814, 816-17 (1993) (“[T]he crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change.”), citing *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (2d Cir. 1964), enfg. in part, 137 NLRB 306 (1962); see also, *Liberty Homes, Inc.*, 257 NLRB 1411, 1412 (1981) (explaining the Board should not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated); *Super Tire Stores*, 236 NLRB 877, 877 n.1 (1978) (stating that “Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent’s position.”).

Throughout this burden shifting analysis, the ultimate burden remains on the charging party to prove the elements of an unfair labor practice by a preponderance of the evidence. *Wright Line*, 251 NLRB at 1088 n.11.

IV. ARGUMENT

While the Company will concede that the alleged Discriminatees engaged in some protected activity, there is no evidence for the third or fourth elements of the prima facie case of discrimination under Sections 8(a)(1) and (3) of the NLRA. There is no substantial, admissible evidence of anti-union animus (only conjecture and suspicion and even that is generalized and not specific to the alleged discriminatees) and even if there was, there is no causal link with the Company's decision to terminate Ms. Nowakowska or Mr. Bussiere.

Here, there is no evidence of union animus or hostility toward the union or partners protected concerted activities. The record evidence shows that while Starbucks was aware of public in-person demonstrations and public social media posts, Starbucks never made any disparaging remarks about the union or its employees potential union activities. An assessment of the temporal relationship between all the alleged protected activity in this matter and the adverse actions does not support an inference of causation. In fact, a careful assessment of the timing of the relevant events suggests just the opposite.

Even if the General Counsel could establish a prima facie case of 8(a)(1) and 8(a)(3) violations, which he cannot, Starbucks has shown that it would still have disciplined and terminated Mr. Bussiere and Ms. Nowakowska regardless of their alleged protected concerted activities. Starbucks presented evidence showing that other partners who did not engage in the alleged protected activities were also disciplined for the same or similar violations of Company policy. Further, there is evidence that other partners who engaged in the same alleged protected activities were not disciplined or terminated by the company. Thus, the Mr. Bussiere and Ms. Nowakowska's allegations must fail.

A. Starbucks Did Not Violate the Act by Disciplining and Discharging Echo Nowakowska and TJ Bussiere

1. General Counsel Failed to Establish Substantial Anti-Union Animus.

The claim that the Starbucks violated Sections 8(a)(1) and (3) by disciplining and ultimately terminating Mr. Bussiere and Ms. Nowakowska must fail, because the General Counsel and the Charging Parties failed to prove that Mr. Bussiere and Ms. Nowakowska's protected concerted activity were a substantial motivating factor in Starbucks's decisions to issue disciplinary actions. *See, e.g., NLRB v. Transp. Mgmt.*, 462 U.S. 393, 399-403 (1983) abrogated on other grounds by *Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 268 (1994) (it is the General Counsel's burden to prove a motivating factor, and the burden is one of persuasion, not merely of production).

The General Counsel and the Charging Parties can meet their burden to prove discriminatory motivation under *Wright Line* by providing direct evidence of a discriminatory motive or sufficient circumstantial evidence such that a discriminatory motivation can be inferred from the record as a whole. *E.g., Robert Orr/Sysco Food Servs.*, 343 NLRB 1183, 1184 (2004); *Manor Care of Easton, Pa, LLC*, 4-CA-36064, 2009 WL 196092 (Jan. 23, 2009).

2. The General Counsel and the Charging Parties Did Not Prove Animus by Direct Evidence

Here, there is no evidence of union animus or hostility toward the union or partners protected concerted activities. The record evidence shows that while Starbucks was aware of partners' public in-person demonstrations and public social media posts, Starbucks never made any disparaging remarks about the union or its partners potential union activities.

Starbucks anticipates that the General Counsel and/or the Charging Parties will argue that animus by direct evidence has been proven, because during a meeting with Ms. Nowakowska, Mr.

Bussiere, and Ms. Cioffi, Mr. Eckensberger stated that “demand reply demand reply” was not compatible with Starbucks’ mission and values. (R-1A; R-1B). While there is no dispute that Mr. Eckensberger made this statement, such statement does not constitute direct evidence of animus and the General Counsel ignores the context of this statement both within the entire conversation as well as the discussion immediately preceding and following this statement in an effort to mischaracterize it as a threat.

The record shows that Mr. Eckensberger made this statement in response to Ms. Nowakowska’s request that Ms. Graves be terminated from her employment. In response to this question, Mr. Eckensberger explained when Starbucks will investigate and engage in due process prior to making any decisions about Ms. Grave’s employment. (Tr. 270, 562); (R-1A; R-1B). Mr. Eckensberger also emphasized that he wanted to engage in an open dialog with Starbucks partners. (*Id.*) Both Mr. Eckensberger and Ms. Cioffi stated multiple times, including immediately following this statement re demand-reply, that the complaints in the July 22 letter would need to be investigated before Starbucks could respond and address them. (*Id.*) The very meeting in which this comment was made was undisputedly for the purpose of better understanding the July 22 Complaint and additional details regarding same that Mr. Eckensberger and Ms. Cioffi requested and received from Ms. Nowakowska and Mr. Bussiere. Thus, the only logical interpretation of Mr. Eckensberger’s comment was that Starbucks wouldn’t be replying to the demands without conducting an investigation and having an informed discussion with its partners.

Indeed, from their own testimony it is clear that Mr. Bussiere and Ms. Nowakowska understood the statement in this context. Ms. Nowakowska testified that she understood that Starbucks needed to review records in order to respond to her scheduling demands. This claim is further belied by the fact that Starbucks *actually* responded to the partner’s demands. It is

undisputed that Starbucks not only initiated an investigation into the allegations presented by the partners, but that it terminated Ms. Graves, and rolled out a shift swap application in response to the partners' demands. (Tr. 152, 303, 341). Thus, Mr. Eckensberger's statement was not direct evidence of animus, but rather a non-discriminatory and transparent attempt to explain the way Starbucks would approach the partner's concerns.

Similarly, the General Counsel may also try to argue that Starbucks' awareness of social media posts posted on the Instagram page Philly Barista Justice was also evidence of union animus, but this allegation must also fail. First, it is undisputed that the Instagram page of the Philly Barista Justice is open to the public and that anybody who clicked on the page could see its content. (Tr. 396). The public posts specifically mentioned Starbucks and contained the hashtags "#starbucksphiladelphia," "#starbucksphilly," and/or "#starbucks." (GCX-20). Second, Ms. Cioffi explained that as a publicly traded company, Starbucks has a media relations department that tracks any public mentions of the company on social media, newspapers, and TV. (Tr. 90). In addition, former operations systems analyst Christina Aguilar also testified that Starbucks tracks all public social media mentions, regardless of who posted them or what content was posted, and that the purpose of these activities is to provide an understanding of the context of discussions related to the brand. (Tr. 702-03). Thus, Starbucks's tracking and awareness of public mentions by the Philly Barista Justice Instagram page was consistent with its regular business practices and cannot form the basis for a finding of animus.

Moreover, there is no evidence that Starbucks knew that Mr. Bussiere was in charge of the Philly Barista Justice Instagram page. The Philly Barista Justice page does not expressly name Mr. Bussiere as the author of the page, nor is Mr. Bussiere identified as the author of any of the social media posts presented by the General Counsel. (GCX-20). The General Counsel did not provide a

scintilla of evidence that Starbucks was aware of Mr. Bussiere's preparation of social media posts that mentioned Starbucks, and there is no testimony or evidence in the record that Starbucks was aware that Mr. Bussiere was the manager of the Philly Barista Justice Instagram page.

Finally, Board law is clear that an employer's observation of publicly disseminated union activity on the internet is not unlawful. *See Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005) (Board held that supervisor's observation of union activity made public on an open Yahoo website did not constitute unlawful surveillance). Thus, Starbucks' awareness of public social media posts that specifically identify Starbucks cannot form the basis of a finding of union animus.

a. The General Counsel and the Charging Parties Did Not Produce Circumstantial Evidence Sufficient to Support an Inference Of Animus

To the extent Mr. Vaughan's comments about his personal frustrations with Mr. Bussiere and Ms. Nowakowska is argued by the General Counsel and/or the Charging Party to be circumstantial evidence of animus, it is not the "substantial evidence" required to support an inference of animus. *Steel-Tex Mfg. Corp.*, 206 NLRB 461, 463 (1973) ("[i]nferences must be founded on substantial evidence upon the record as a whole"). To support an inference of animus, the "totality of circumstances must show more than a mere suspicion that protected or union activity was a motivating factor in the employer's decision." *Allied Aviation Fueling of Dallas*, 347 NLRB 248, 255 (2006) (citing *Abramson, LLC*, 345 NLRB 171, 175 (2005)). The "totality of the circumstances" does not do so here. Rather, when the record is examined as a whole, the overwhelming weight of the evidence prevents any inference of animus.

b. Credible Uncontroverted Evidence Indicates Starbucks Supported Partner's Engagement in Protected Concerted Activity

The uncontroverted record evidence establishes that Starbucks has always maintained an open-door policy, and that it actively sought feedback from its partners through various channels, including through Partner Open Forums, town halls, webcasts, and in person meetings with partners. (JX2a-000044). The undisputed record evidence proves that management repeatedly met with Ms. Nowakowska and Mr. Bussiere to discuss their concerns, that they held meetings with all partners to discuss any other possible issues at the store, and that they took active steps to respond to the partners' demands, questions, and concerns.

In particular, the day after Mr. Bussiere called Partner Resources to share his concerns, Mr. Henderson went to the Broad & Washington store to speak to Mr. Bussiere about his concerns. (Tr. 326-27). Similarly, when partners brought forward concerns during the July 2019 demonstration, Starbucks' Partner Resources representatives were in the store ready to talk to the partners and listen to their questions and concerns. (R-1A; R-1B). A few days later, Starbucks representatives returned to the store to meet with partners and inform them of the steps that they were undertaking to address their concerns. (R-51A; R-51B). Starbucks not only listened to partners' concerns, but also took action by terminating Ms. Graves and implementing new scheduling systems.

Moreover, other partners who were involved in the demonstrations were not disciplined. The Board and administrative law judges routinely consider evidence that an employer did not discipline other known union supporters as probative of whether union animus likely motivated the employer's decisions with respect to the particular partners at issue. *See, e.g., La Mousse, Inc.*, 259 NLRB 37, 47 (1981) (finding no 8(a)(3) violation, where employer terminated one union supporter but did not discipline another); *Old Tucson Corp.*, 269 NLRB 492, 498 (1984) (finding

no 8(a)(3) violation where “[t]here were, after all, numerous other [partners] who from the tally of ballots were also known to have voted for the Union [who were not disciplined]”). Ms. Nowakowska and Mr. Bussiere both testified that although Broad & Washington baristas Chloe Heldt and Brooke Haine both participated in the July 2019 store demonstrations, and Starbucks took no disciplinary actions against them. (Tr. 113, 257-58, 538-39). Both Chloe Heldt and Brooke Haine resigned out of their own volition. (Tr. 1129-30) (Dragone testimony). Both partners were in good standing at the time of their resignation and did not have any corrective actions on file. (Tr. 1130).

c. Brief Expressions of Frustration by Management Are Insufficient to Support an Inference of Animus

Starbucks anticipates that the General Counsel and/or the Charging Parties will argue that email communication sent by Mr. Vaughan referring to Mr. Bussiere and Ms. Nowakowska constitute evidence of animus. (GCX-37k; GCX-46). Mr. Vaughan’s comments are, at most, evidence of momentary frustration or impatience, which is not the same as evidence of animus. *See, e.g., Finlay Bros. Co.*, 282 NLRB 737, 739 (1987). The evidence of Mr. Vaughan’s emails to his supervisor Mr. Dragone shows, not animus, but a desire to find support for the difficulties in managing Mr. Bussiere and Ms. Nowakowska as they began to display a dismissive attitude towards the Mr. Vaughan which was impacting customer service and the store environment. Moreover, because none of the communications expressing momentary frustration or impatience were made by Mr. Dragone or Mr. Eckensberger, the individuals who issued and approve discipline issued to Mr. Bussiere and Ms. Nowakowska, they do not suggest animus. *See, e.g., Hudson, Inc.*, 275 NLRB 874, 874-75 (1985) (anti-union sentiment of supervisor did not establish animus where supervisor did not make decision).

While the General Counsel placed particular emphasis on Mr. Vaughan's statement that he was "willing to deal with the backlash that would come with terminating the two of them because it doesn't matter if we terminate now or 1 year from now they will still call NLRB & spew vicious lies" during his opening statement, this statement is unsurprising given that Mr. Bussiere and Ms. Nowakowska had both threatened Mr. Vaughan with going to the NLRB even over incidents which were not a violation of the Act. (Tr. 892). Mr. Vaughan testified that during his first weeks at the Broad & Washington store, Mr. Bussiere and Ms. Nowakowska both approached him and asked him what he would do if someone disrespected a transgender partner in the store. (Tr. 787). Mr. Vaughan testified that while he was responding to their questions, Ms. Nowakowska tried to record him. (Tr. 788). When Mr. Vaughan tried to end the conversation, Ms. Nowakowska threatened to call the NLRB, because she did not like his response. (Tr. 789).

d. An Assessment of Temporal Proximity Weighs Against an Inference of Animus

An assessment of the temporal relationship between all the alleged protected activity in this matter and the adverse actions *does not* support an inference of causation. In fact, a careful assessment of the timing of the relevant events suggests just the opposite.

While temporal proximity alone cannot establish causation, a lack of temporal proximity can provide strong evidence against causation. *See, e.g., Laidlaw Env'tl. Servs.*, 314 NLRB 406, 406 (1994) (the passage of about a year between the protected activity and allegedly retaliatory activity indicates the lack of a retaliatory motive); *NLRB v. Kay Elecs., Inc.*, 410 F.2d 499, 502 (8th Cir. 1969) (two months between union activity and discharge "weighs heavily against" a finding of causation). In this case, Mr. Bussiere and Ms. Nowakowska began engaging in a course of alleged protected activity in July of 2019 when they participated in a demonstration and met

with Starbucks managers to discuss partner concerns, but the first alleged adverse action did not occur until almost three months later when Ms. Nowakowska was disciplined for poor customer service on October 29, 2019. (JX-7).

The first alleged instance of discrimination against Mr. Bussiere did not take place until almost four months after his alleged protected activities when he was disciplined for failing to meet work expectations on November 19, 2019. Similarly, Ms. Nowakowska's termination on January 26, 2020 and Mr. Bussiere's termination on February 26, 2020 were more than two months since they participated in the second store demonstration in November of 2019. These large temporal gaps between the alleged protected concerted activities and the alleged discrimination is, in and of itself, evidence of the absence of a retaliatory motive. *See Frierson Bldg. Supply Co.*, 328 NLRB No. 149 (1999) (Eight weeks between concerted activities and employee discharges regarded as coincidental and not warranting inference of animus). The ALJ cannot ignore the existence of such a delay when assessing the totality of the circumstances.

e. Evidence That the Parties Implemented Additional Levels of Scrutiny for the Disciplinary Actions Weighs Against An Inference Of Animus.

The record is replete with examples of how Starbucks took active steps to ensure that Mr. Bussiere and Ms. Nowakowska were treated fairly and consistently. While a district manager can ordinarily make disciplinary decisions about a store partner on their own, Mr. Dragone consulted with Partner Resources in order to obtain objective input and scrutiny with regard to Ms. Nowakowska's termination. (Tr.1136-37). Similarly, Mr. Eckensberger testified that although he does not typically get involved in the discipline of hourly partners, he took responsibility over the decision to terminate Mr. Bussiere, because he wanted to ensure that Starbucks' internal processes were followed, and that Mr. Bussiere was treated fairly and consistent with the company's policies.

(Tr. 1370). *See Spring v. Sealed Air Corp.*, Civ. A. No. 10-4655, 2011 U.S. Dist. LEXIS 108331 (E.D. Pa. Sep. 21, 2011) (noting the defendant conducted a lengthy recommendation and review process with multiple levels of review before making the lawful decision to terminate); *Lakeside-Scott v. Multnomah Cty.*, 556 F.3d 797, 804 (9th Cir. 2009) (“[A]s a matter of law, if the facts show[] that the final decision-maker made a wholly independent, legitimate decision to discharge the [employee], uninfluenced by the retaliatory motives of a subordinate,” then the subordinate’s retaliatory motive cannot be considered a motivating factor).

3. Ms. Nowakowska and Mr. Bussiere Were Disciplined for Legitimate Business Reasons.

Even if the General Counsel could establish a *prima facie* case of 8(a)(1) and 8(a)(3) violations, which he cannot, Starbucks has shown that it would still have disciplined and terminated Mr. Bussiere and Ms. Nowakowska regardless of their alleged protected concerted activities. *Monroe Mfg.*, 323 NLRB No. 2, at 27 (1997).

a. Ms. Nowakowska Received a Written Warning For Failing To Make Customer Connections and Not Following The Drink Hand-Off Procedure.

The responsibilities of a barista include “[c]reat[ing] a warm and welcoming environment by taking initiative to greet and thank customers;” and “[d]emonstrat[ing] [Starbucks’] customer service commitment (smiling, offering a friendly greeting, learning customers’ names and orders, assuming the best in others, saying thank you) in each interaction[.]” (JX-5). Ms. Nowakowska received the documented coaching after she, over multiple days, did not meet the responsibilities of a barista by slamming beverages on the handoff counter and not engaging customers. The record is clear that Ms. Nowakowska was repeatedly coached on these behaviors, yet, her performance did not improve. Thus, her conduct warranted the issuance of a corrective action in the form of a written warning.

In October of 2019, Mr. Vaughan Jr. verbally coached Ms. Nowakowska about her customer service skills and her tendency to “slam” cups down on the counter. (Tr. 864-65). When Ms. Nowakowska asked Mr. Vaughan to show her how he wanted the drink handoff to be handled, Mr. Vaughan actually modeled drink hand-off for Ms. Nowakowska. (Tr. 867). Mr. Vaughan also spoke to Ms. Nowakowska about other recurrent customer service issues, including Ms. Nowakowska rolling her eyes and complaining about a customer’s drink and the customer’s requests. (Tr. 868-69). Mr. Vaughan spoke to Ms. Nowakowska about her customer service issues and explained that they are in the business of customizing drinks for customers, and that he had observed her “bang the cup down” on two different occasions. (Tr. 869). On another occasion, when Mr. Vaughan asked Ms. Nowakowska to call out the drink again in case the customer did not hear her, Ms. Nowakowska replied “well maybe if she wasn’t talking that she would have saw the drink. I called it out already.” (Tr. 866). Ms. Nowakowska became combative with Mr. Vaughan, so Mr. Vaughan had to call out the customer’s name himself. (Tr. 866-67). After observing these recurring issues and repeatedly coaching Ms. Nowakowska, Starbucks had good faith basis to conclude that Ms. Nowakowska was violating its policies and decided to issue a documented coaching to Ms. Nowakowska. (Tr. 869).

Ms. Nowakowska’s discipline was consistent with Starbucks’ discipline of other partners for poor customer service. For instance, Felicia Dashiell received a written warning after she failed to connect and thank customers. (GCX-13(d)). Starbucks had made clear to Ms. Dashiell that she needed to improve her customer service skills by coaching her on how to provide a friendly greeting to customers and on how to project her voice when calling out dinks in order to create a warm and welcoming environment in the store. (*Id.*) Despite these coachings, Ms. Dashiell, like Ms. Nowakowska, continued to exhibit poor customer service.

b. Ms. Nowakowska Was Terminated For Poor Customer Service After She Was Hostile and Rude To Customers.

The record evidence shows that Starbucks would have terminated Ms. Nowakowska's employment regardless of any alleged unspecified protected concerted activity based on her unacceptable behavior towards customers. On or about January 16, 2020, Ms. Nowakowska had another incident of poor customer service. (JX-12). Cora Siburt testified that while she was working with Ms. Nowakowska a regular customer had asked for light ice in her drink and Ms. Nowakowska, who was preparing her drink, developed an attitude and starting "slamming drinks down on the counter." (Tr. 1067). Ms. Siburt stated that when the customer started to get visibly angry, Ms. Nowakowska told her to "make the drink herself" and left the floor. (Tr. 1067). Ms. Siburt was left alone working on the bar. (Tr. 1070). Ms. Siburt also testified that the other customers were close by and she believes they overheard the interaction. (Tr. 1069-70). Ms. Nowakowska confirmed that she serviced this customer but denies that she had a negative exchange with the customer. (Tr. 222). However, Ms. Siburt's testimony should be credited over Ms. Nowakowska because she was an active hourly partner at the time of the hearing. Moreover, her testimony was consistent with her written recollection of the events, which she submitted via email almost a year prior to the hearing date. (JX-11).

Shortly thereafter Ms. Nowakowska once again engaged in unacceptable behavior towards a customer. On January 22, 2020, Ms. Nowakowska argued with a customer and refused to provide him with a tea bag he was requesting. (JX-10; Tr. 1295-1296). When the same customer asked for a pack of butter, Ms. Nowakowska stated "and now you're trying to get free butter." (*Id.*). Following this incident, the customer also approached Mr. Vaughan to discuss the incident, and expressed to him that he did not like the way he was treated by Ms. Nowakowska. (Tr. 896). Mr. Vaughan assured him that he would handle the situation. (*Id.*) Ms. Nowakowska confirmed this

customer interaction took place. (Tr. 223-226). Ms. Nowakowska testified that she engaged in “back and forth” with the customer over whether he could get the tea bags he requested. (Tr. 224). Ms. Nowakowska also confirmed that she stated, “now you want the butter” and that other customers were present. (Tr. 226). Based on these two incidents, Starbucks had a good faith belief that Ms. Nowakowska had violated Company policy and had a legitimate basis for terminating her. (Tr. 891).

c. Ms. Nowakowska’s Discipline and Termination Was Consistent With How Starbucks Has Treated Other Partners Who Engaged In Similar Behavior

Ms. Nowakowska’s discipline was consistent with Starbucks’ discipline of other partners for poor customer service. The record shows that Mr. Vaughan disciplined two other partners for poor customer service: Madeline Jarvis and Eddie Hayward. (Tr. 875); (GCX-13(f); GCX-13(i)). On December 4, 2019, Ms. Jarvis was disciplined for poor customer service after she engaged in a heated verbal exchange with a disabled customer, in front of other customers. (GXC-13(f); Tr. 875-78). Mr. Vaughan stepped in to help diffuse the interaction between the customer and Ms. Jarvis, but Ms. Jarvis did not back away. (Tr. 876). When the customer called Ms. Jarvis unprofessional, she started going back and forth with the customer. (*Id.*) Throughout this interaction, Mr. Vaughan repeatedly asked Ms. Jarvis to step back from the interaction and she refused to do so. (Tr. 876). Following this incident, Ms. Jarvis was terminated for poor customer service. (GCX-13(f)). Similarly, on December 31, 2019, Mr. Vaughan issued a final written warning to Mr. Heyward for poor customer service. (GCX-13(i)). Mr. Heyward failed to acknowledge a customer who was waiting for service, and then rushed to make the customer’s drink and to end the interaction. As a result, the customer felt rushed and ignored. (*Id.*) On another occasion, Mr. Heyward was on his cell phone while working on the bar and gestured to a customer for her to hold on until he finished his phone conversation. (Tr. 878). Mr. Heyward not only failed

to interact with a customer but also failed to make the customer's beverage to standard. (GCX-13(i)).

Moreover, Starbucks has terminated and disciplined partners at other stores for not meeting Starbucks' customer service standards. Starbucks terminated a Barista, Uniqua Williams, at its Broad & Jackson store, after she was a rude to a customer who asked to have her drink remade. (GCX-13(p)). Additionally, another Barista, Ayda Hartnett, at its 1201 Market store, was given a final written warning after a guest came in and requested decaf coffee and Ms. Hartnett replied that they did not have decaf coffee instead of offering to brew more coffee. (GCX41-000080). Significantly, there is no evidence on the record that Starbucks was aware of any protected concerted activities by Ms. Jarvis, Mr. Heyward, Ms. Hartnett, or Ms. Williams.⁷ Thus, Starbucks' issuance of discipline to these partners shows that Starbucks would have disciplined Ms. Nowakowska for her poor customer service, regardless of whether she engaged in any alleged protected activities.

d. Tristan Bussiere Was Disciplined for Repeatedly Disregarding His Supervisor's Directives.

The General Counsel claims that Starbucks violated §§ 8(a)(1) and (3) of the Act on or about November 19, 2019 and on February 5, 2019, when it allegedly issued a warning to Mr. Bussiere, because of his alleged union and protected concerted activities. ¶¶ 12(a), I; 14, 15. However, these allegations must fail, because Starbucks has established that it disciplined Mr. Bussiere for repeatedly and intentionally disregarding Mr. Vaughan's directives.

On November 21, 2019, Mr. Bussiere was issued a written warning for failing to meet the

⁷ The General Counsel has not presented any evidence to establish that Starbucks was aware of Ms. Jarvis alleged protected concerted activities. Ms. Jarvis did not participate in the group events at the Broad & Washington Store in July and November of 2019, and did not sign the demand letter that was presented to Ms. Graves. (Tr. 665). Further, the General Counsel has not put forth *any* evidence to show that Mr. Heyward, Ms. Williams, or Ms. Hartnett engaged in any alleged protected concerted activities, or of Starbucks's knowledge of the same.

expectations of a Barista. (JX-15). The disciplinary notice provided that despite receiving prior coachings Mr. Bussiere: (1) failed to wear a hat and apron while preparing food and drinks; (2) failed to display the breakfast sandwiches; (3) left the sales floor on at least three occasions causing the warming station to be backed up. Moreover, the disciplinary notice also stated that the Store Manager had been approached by several partners stating that Mr. Bussiere's behavior was becoming a distraction. (*Id.*).

The record evidence shows that Starbucks maintained a Dress Code policy that requires partners to wear an apron "at all time while working." (JX-2A). In addition, the policy provides that hats are optional "unless required by state or local law." (*Id.*) In Pennsylvania, the health department requires partners to wear a hat and apron while preparing food or beverages. (Tr. 807 (Vaughan Testimony), 634 (Jarvis Testimony)). In October, Mr. Vaughan repeatedly coached Mr. Bussiere on the need to wear a hat and apron while working at the store in order to comply with health department requirements. (*Id.*) Despite these coachings, Mr. Bussiere inexplicably continued to work without hat or apron. (Tr. 810). Mr. Bussiere acknowledged that Mr. Vaughan had asked him to put on his hat. (Tr. 373). However, when asked how many times a manager had asked him to put on his hat, he elusively replied "It's been a while I don't remember." (Tr. 374).

Mr. Vaughan also repeatedly coached Mr. Bussiere about the pastry case over a period of at least one month. (Tr. 812-813). Despite these coachings and Mr. Vaughan's explicit instructions on how to fill the pastry case, Mr. Bussiere continued to ignore Mr. Vaughan's directives. (*Id.*) Mr. Bussiere acknowledged that on at least one occasion there were items missing from the pastry case, and that he sometimes forgot to display products in the case. (Tr. 356). Mr. Bussiere was also coached for leaving the sales floor when he was planted at a particular post on at least 25 to 30 occasions on staying in his planted position. (Tr. 817). Despite Mr. Vaughan's directive, on

October 26, 2019, Mr. Bussiere left his post, and Mr. Vaughan had to ask him to return to his post two more times. (*Id.*) Mr. Bussiere confirmed that he left his post but, claimed that he had not understood Mr. Vaughan's directive (Tr. 383).

e. Bussiere's Discipline Was Consistent With How Starbucks Has Treated Other Partners Who Engaged In Similar Behavior and He Was In Fact Given More Opportunities to Correct His Behavior Before Being Disciplined

In light of Mr. Bussiere's repeated violations, Starbucks had a good faith belief that Mr. Bussiere was refusing to follow established policies and his shift supervisors' and managers' directives such that additional coaching would not result in improvement and Starbucks lawfully acted on that belief. The record demonstrates that Starbucks would have disciplined Mr. Bussiere regardless of any protected activity. Starbucks presented evidence that it regularly disciplines partners who despite their supervisor's directives, continue to violate Starbucks's policies. For instance, Ronnie Pierre, Felicia Dashiell, Eddie Hayward, and Uniqua Williams, Gigi Hernandez, Kaliah Bledsoe, Faust Rivera, were all disciplined for repeatedly violating company policies, despite their supervisor's directives. (GCX-13(e); GCX-13(j); GCX-13(h); GCX-13(n); GCX-13(u,v); GCX-13(w,y), GCX-13(c)).

By contrast, examples provided by the General Counsels are not accurate comparators for Mr. Bussiere's discipline. While the General Counsel introduced examples of other partners who were not disciplined for failing to wear a hat while at work, there is no evidence that these partners were *actually* required to wear a hat because they were preparing food or drinks. Partners can remove their hats when they are on break, in the back room, or working on other tasks that do not involve the preparation of food and drinks. Thus, it is not enough to show that other partners failed to wear hats. The General Counsel must also show that these partners were preparing food or drinks and were required to wear a hat.

Further, there is no evidence that any of the partners who allegedly failed to wear a hat explicitly disregarded their manager or supervisors' directives, much less that they did so as often or immediately following coaching on the issue like Mr. Bussiere did. Similarly, there is no evidence that partners who moved off of planted positions were directed not to move from their planted positions or that they disregarded these directives. Thus, the General Counsel has failed to proffer sufficient evidence to establish that Mr. Bussiere was subjected to disparate treatment, and the Judge should credit Starbucks' comparators over the comparators provided by the General Counsel.

f. Mr. Bussiere Was Terminated For Spreading A False Rumor That Another Partner Was Going To Be Terminated.

The General Counsel alleges that Starbucks violated §§ 8(a)(1) and (3) of the Act on or about February 26, 2020, when it discharged Mr. Bussiere, because of his alleged union and protected concerted activities. ¶¶ 12(c), (e); 14, 15. However, the record establishes that Mr. Bussiere was terminated for lying to another partner by telling him that the Store Manager stated that he would be terminating him.

(1) Mr. Bussiere knowingly spread a false rumor that Mr. Allen was going to be terminated.

On February 16, 2020, Mr. Bussiere told Mr. Allen that he “had heard a rumor allegedly originating from Cora [Siburt]” that Mr. Vaughan was going to fire Mr. Allen. (Tr. 459-62). Mr. Bussiere does not dispute that he did not have any evidence that this statement was true. (*Id.*) Instead, he repeatedly referred to this statement as a “rumor” during his testimony at the hearing. Ms. Siburt denied making this statement and testified that she had not talked to Mr. Bussiere in the weeks preceding Mr. Bussiere’s conversation with Mr. Allen. (Tr. 1065). After Ms. Siburt reported this incident, Starbucks conducted an investigation and spoke to Mr. Allen, who corroborated that Mr. Bussiere had told him he would be terminated. (Tr. 1372).

Although Starbucks attempted to reach Mr. Bussiere to obtain his version of the events, Mr. Bussiere refused to participate in the investigation process. (*Id.*) On February 20, 2020 Starbucks called Mr. Bussiere to investigate the allegations made by Ms. Siburt. (Tr. 462). Mr. Bussiere answered the call and hung up when he heard the person was calling from the Partner Resources Center. (Tr. 462). Based on this investigation, Starbucks concluded that Mr. Bussiere had spread a false rumor that another partner was going to be terminated by the Store Manager. (Tr. 1372-73).

On the morning of February 26, 2020, Starbucks terminated Mr. Bussiere's employment for knowingly spreading a false rumor about the Store Manager's intentions to fire a partner. (JX-19; Tr. 458). Mr. Eckensberger ultimately made the decision to terminate and considered the negative impact of Mr. Bussiere's impact on repeated and intentional violations of Starbucks Mission and Values on the other partners in the store. (Tr. 1374-75).

(2) Mr. Bussiere's Actions Tarnished Partner Morale and impacted the overall store environment.

It is undisputed that Mr. Bussiere's statements to Mr. Allen had an impact on other store partners and the overall store environment. Mr. Eckensberger testified that in addition to failing to treat others with "respect and dignity" Mr. Bussiere's actions had changed the environment in the store. (Tr. 1372, 1375). In an email to Mr. Vaughan, Ms. Siburt discussed the personal impact of this incident:

This morning at work, I was very hurt to know that even though I do my job, I am happy, I am successful, and have good connections with all of my fellow baristas, that I still was drug into drama that I absolutely have no part of. I tried to avoid it by not talking to TJ at all, and I STILL am being pulled into this negative hole.

(JX-18).

Ms. Siburt also discussed the impact Mr. Bussiere was having on her coworkers:

I've never felt sad or betrayed, but today I did. I also watch my coworkers alongside me feel the same way. We are all slowly being pulled down. Leanne even had a panic attack this morning in the back when TJ tried to instruct her on how to do HER job. I hate the way I've been feeling, but most importantly, Im very upset to see the way all of my partners are being affected as well.

....

And I love David, and the baristas whom I work with. And to see them all breaking down slowly and struggling to remain happy and positive just because of one person is heart breaking to me. We are a strong team. I know we are. But it's becoming harder and harder for us to remain calm and feeling safe here.

(*Id.*).

Similarly, Mr. Vaughan also emailed Mr. Dragone to discuss the impact of Mr. Bussiere's statements:

This is A[n] attempt by TJ, to cause division & drama between the partners. Cora 100% denies ever saying any of this. Please keep in mind Cora, TJ, Simon all work together, what dose [sic] this do for customer connection? Honestly I don't even know if I'm allowed to approach TJ . His actions have caused two of my key partners to feel uncomfortable while at work.

(GCX-46).

Based on the record evidence, Starbucks had a good faith basis for terminating Mr. Bussiere for spreading a false rumor that another partner was going to be terminated, and for affecting the overall environment and partner morale. *Lutheran Social Serv.*, 250 NLRB 35, 44 (1980) (employer did not violate the Act by terminating employees who had engaged in “more than 3 months of unchanneled complaining and disparagement of management, plainly resulting in the destruction of employee morale[.]”).

(3) Mr. Bussiere lying about Mr. Allen did not constitute protected concerted activity.

Section 7 of the NLRA gives employees the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C.S. § 157. For an employee’s activity to be concerted, the employee must be engaged in with or on the authority of other employees, and the activity must be for the purpose of mutual aid or protection. *Meyers Indus.*, 268 NLRB 493, 497 (1984) (Meyers I). *See also Meyers Indus.*, 281 NLRB 882 (1986) (Meyers II). Furthermore, “[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . if it looks forward to no action at all, it is more than likely to be mere ‘griping.’” *Mushroom Transp. Co. v. N. L. R. B.*, 330 F.2d 683, 685 (3d Cir. 1964). *Alstate Maintenance LLC*, 367 NLRB No. 68, at *4 (Jan. 19, 2011) (explaining that comments are not concerted merely because they are asserted in a group meeting; rather, there must be evidence that the speaker was seeking to initiate or induce group action).

(4) Here there is no evidence that Mr. Bussiere sought to initiate or prepare for group action.

Mr. Bussiere testified that he told Mr. Allen about the rumor, so that he could make sure that he had enough money to pay his bills if he lost his job. (Tr. 461-462). In the absence of any indicia that Mr. Bussiere or Mr. Allen were attempting to engage in group action, Mr. Bussiere’s statements to Mr. Allen that he was next to be fired are not protected under Section 7 of the NLRA. *N.L.R.B. v. Datapoint Corp.*, 642 F.2d 123, 125-26 (5th Cir. 1981) (employees proclamation to other employees that a company layoff was illegal and against company policy was not concerted activity when there was no evidence that the employee contemplated or attempted to initiate group action).

Moreover, lying is not protected under the Act, even if it is intertwined with protected conduct. *See, e.g., Encino Hosp. Med. Ctr.*, 360 NLRB 335, 335-36 (2014) (union steward's dishonesty in an attempt to gain information was not protected); *United Parcel Serv.*, 311 NLRB 974, 974-75 (1993) (employee not engaged in protected activity when he acquiesced to union officer's misrepresentation of himself as a law enforcement officer when investigating work issue). Because Bussiere knew his statement was false, Mr. Bussiere's termination does not violate the Act. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399-400 (1983) (applying Wright Line, holding the employer does not violate Sections 8(a)(1) and 8(a)(3) where the termination "rested on an employee's unprotected conduct as well and that the employee would have [been discharged] in any event.") Starbucks Would Have Terminated Mr. Bussiere And Ms. Nowakowska For Making Audio Recordings Of Other Starbucks Employees Without Obtaining Their Prior Consent, Regardless Of Any Alleged Union Activity.

B. Jean Hippensteel and Sean Korman Did Not Unlawfully Surveil Partners.

The General Counsel alleges that Store Managers Jean Hippensteel and Sean Korman, engaged in surveillance of its partners' union activities and protected concerted activities by sitting at a table with partners who were known to be leading participants in union activities and protected concerted activities. GCX1-00073, ¶¶ 7, 15. Here, there is no evidence to support either that Starbucks actually interfered with, restrained, and coerced its partners in the exercise of their Section 7 rights by engaging in surveillance of their union and or protected concerted activities.

An employer may lawfully observe employees engaged in public protected activities so long as the employer does not do something "out of the ordinary" and thereby coercive. *Broadway*, 267 NLRB 385, 400 (1983) ("If a union wishes to organize in public it cannot demand that management must hide."); *see also Milum Textile Servs. Co.*, 357 NLRB 2047, 2072 (2011)

(agreeing with ALJ that surveillance charge should be dismissed where supervisor observed employees engaging in open union activity in the course of her normal routine, and relying on long-standing Board law that “[m]ere supervisory observation of open, public union activity on or near [an employer’s] property does not constitute unlawful surveillance”).

To determine whether surveillance is “out of the ordinary” and, thus, potentially coercive, the Board considers various factors, including: “the duration of the observation, the employer’s distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation.” *Aladdin Gaming*, 345 NLRB at 586 (finding that supervisors who observed employees for two minutes then interrupted an employee meeting in a dining room used by both employees and supervisors did not engage in unlawful surveillance).

First, the General Counsel has failed to establish that Mr. Bussiere and Ms. Nowakowska were *actually* engaging in protected concerted activities when Store Managers Mr. Korman and Ms. Hippensteel sat at the community table. The record establishes that on January 29, 2020, Ms. Nowakowska went to the Broad & Washington store to meet Mr. Bussiere for lunch. (Tr. 227).⁸ However, there is a factual dispute as to whether Ms. Nowakowska was sitting by herself at the community table when Mr. Korman sat down at table with her, or whether she was sitting with Mr. Bussiere. Ms. Nowakowska testified that she was sitting alone at the community table when Mr. Korman sat down at the table with her, and that at some point, Mr. Bussiere finished his shift and sat at the table with her. (Tr. 227-29). Similarly, Ms. Hippensteel testified that when she sat down with Mr. Korman, Ms. Nowakowska was sitting alone at the community table. (Tr. 1245). The only person who testified that Mr. Bussiere was already sitting with Ms. Nowakowska when the Store Managers sat down at the table is Mr. Bussiere. (Tr. 444). Regardless of when Mr.

⁸ Significantly, Ms. Nowakowska was no longer a Starbucks employee on this date.

Bussiere joined the table, there is no evidence that Ms. Nowakowska or Mr. Bussiere were concertedly engaged in any activities for the purpose of their mutual aid or protection. It is undisputed that Mr. Bussiere and Ms. Nowakowska were “scrolling through pinterest and instagram together” at the community table. (R30; Tr. 445). Thus, the General Counsel has failed to establish by a preponderance of the evidence, that Ms. Nowakowska and Mr. Bussiere were engaged in protected activities when Mr. Korman, and later Ms. Hippensteel, sat down at the table.

Second, even if the General Counsel could establish that Ms. Nowakowska and Mr. Bussiere were engaged in protected concerted activities, which it cannot, any observations by Mr. Korman and Ms. Hippensteel were not coercive. It is undisputed that Mr. Bussiere and Ms. Nowakowska were seated at the community table, which is a long table located in the front of the store that is accessible to the public. (Tr. 227-28 (Nowakowska Testimony); Tr. 1244 (Hippensteel Testimony)). Ms. Hippensteel testified that the table is called the “community table” because people will sit together at the table, even if they are not part of the same group. (Tr. 1244-45). Thus, to the extent Mr. Bussiere and Ms. Nowakowska were engaged in any alleged protected concerted activities, they were doing in so in full view of the public and Starbucks management. In this context, Mr. Korman and Ms. Hippensteel’s alleged observation of any alleged protected activities is not unlawful. *Broadway*, 267 NLRB at 400 (“employees who chose to engage in their union activities at the employer’s premises should have no cause to complain that management observes them.”).

The General Counsel failed to establish that Mr. Korman and Ms. Hippensteel did anything out of the ordinary that would lead partners to believe that they were being surveilled. Ms. Hippensteel testified that she regularly visited the Broad & Washington store to coach other Store Managers, including Mr. Korman, and that she had sat at the community table before (Tr. 1218-

19; 1244-45). Ms. Hippensteel and Mr. Korman sat at the table for less than an hour and there is no evidence that they engaged in conversation with Ms. Nowakowska or Mr. Bussiere, or that they attempted to overhear their conversation or offer opinion about protected activities. (Tr. 1247). Accordingly, counsel for the General Counsel has failed to meet his burden and the allegation must be dismissed.

C. Navy Ros Did Not Unlawfully Surveil Partners.

The General Counsel failed to establish a prima facie case that Ms. Ros, Store Manager at Penn Medicine Perelman Center unlawfully surveilled Mr. Bussiere to discover his concerted activities. The General Counsel alleges that “[o]n or about December 3, 2019, . . . Navy Ros . . . engaged in surveillance of partners to discover their concerted activities.” (GCX33-000002, ¶ 13). Here, there is no evidence to support either that the Company actually interfered with, restrained, and coerced its partners in the exercise of their Section 7 rights by engaging in surveillance of their union and or protected concerted activities.

Here, there is no evidence to support either that Starbucks actually interfered with, retrained, and coerced its partners in the exercise of their Section 7 rights by engaging in surveillance of their union and or protected concerted activities. To the extent that Mr. Bussiere engaged in protected concerted activity, he did so in the open and on company property. There is no evidence that Mr. Bussiere attempted to conceal his conversations with other partners at the Penn Medicine Perelman Center or otherwise prevent the discovery of his conversations. Thus, Ms. Ros’s observation of Mr. Bussiere’s open and public attempts to speak to other partners on Starbucks’s property do not constitute unlawful surveillance.” *Milum Textile Servs. Co.*, 357 NLRB at 2072 (employer’s observation of open union activity on or near its property does not constitute unlawful surveillance); *Impact Indus.*, 285 NLRB 5 n.2 (1987).

Further, the General Counsel has also failed to show that Ms. Ros' conduct was out of the ordinary. Just as in *Aladdin Gaming*, the duration of Ms. Ros' observation last only a few minutes, she was not that far from Mr. Bussiere, who was discussing the Fair Work Week as well as the termination of Ms. Graves, and there is no evidence in the record that Ms. Ros engaged in any other coercive behavior during her observation. 345 NLRB at 586 (finding that supervisors who observed employees for two minutes then interrupted an employee meeting in a dining room used by both employees and supervisors did not engage in unlawful surveillance). There is no credible basis for finding surveillance by Ms. Ros on December 3. The Complaint should be dismissed, in pertinent part.

There is no evidence that Starbucks took any adverse actions against Mr. Bussiere after he violated Starbucks' community board policy. Following this incident, Mr. Dragon asked Mr. Vaughan to review the community board policy with Mr. Bussiere. (Tr. 860;1007-08). Ms. Hippensteel was present as a witness for this interaction. (Tr. 1251-53). Unbeknownst to Mr. Vaughan and Ms. Hippensteel, Mr. Bussiere recorded this conversation. (R-8A; R-8B). During this interaction, Mr. Vaughan made clear that the purpose of the conversation was to review to the community board policy, and that Mr. Bussiere it was not a corrective action conversation. (*Id.*) Ms. Hippensteel also explained to Mr. Bussiere that pursuant to Starbucks' policy, any postings on the community board needed to be submitted for approval to the Store Manager. (*Id.*). In addition, Ms. Hippensteel and Mr. Vaughan answered Mr. Bussiere's questions without the policy. There is no indication that Mr. Vaughan and Ms. Hippensteel engaged in any surveillance of Mr. Bussiere or that they otherwise attempted to coerce him. Accordingly, the Complaint should be dismissed, in pertinent part.

D. Navy Ros Did Not Interrogate Partners About Their Union Activities

The General Counsel alleges Respondent unlawfully interrogated partners in violation of Section 8(a)(1) of the Act. Specifically, the General Counsel contends that on or about December 3, 2019 Navy Ros allegedly interrogated partners about their protected concerted activities. ¶ 13(b); 14. Here, there is no evidence to support either that the Company actually interfered with, restrained, and coerced its partners in the exercise of their Section 7 rights by engaging in unlawful interrogation of their union and or protected concerted activities.

Ms. Ros did not interrogate any partners about their union support, sympathies or activities. An employer may ask its employees questions without violating Section 8(a)(1) when the questions are “free of accompanying coercive statements”. *Page Avjet, Inc.*, 278 NLRB 444, 444 (1986). Further, when the information sought is relatively harmless, where the conversation is informal, and where the employee answers truthfully, there is no unlawful interrogation. *See Sunnyvale Med. Clinic*, 277 NLRB No. 131, at *9–10 (1985) (holding that employer did not unlawfully interrogate employee because the questioning was informal, the information sought was relatively harmless, and the employee answered truthfully).

The totality of the circumstances favors a finding that Ms. Ros did not unlawfully interrogate partners about their union support, sympathies, or activities. The context surrounding the questioning of Shift supervisor Suvi and Barista Malia, is that in December 2019, Mr. Bussiere picked up a shift at Ms. Ros’ store for the first time and Ms. Ros wanted to determine whether her partners liked working with Mr. Bussiere. (Tr. 674). The nature of the information sought was harmless and was not about union support, sympathies, or activities, but instead whether Ms. Ros’ partners liked working with Mr. Bussiere. The only questions Ms. Ros asked were how was the rest of Suvi’s night [on December 3, 2019], “how [Suvi] felt about working with TJ”, whether Mr. Bussiere “distracted [Malia] from her work”, and in response to Malia stating Mr. Bussiere was

chatty, what Malia and Mr. Bussiere talked about. (GCX36.) None of these questions relate to union support, sympathies, or activities and the questions are harmless. *See Sunnyvale Med. Clinic*, 277 NLRB No. 131, at *10. Further, Ms. Ros' questions were "free of accompanying coercive statements and therefore did not violate Section 8(a)(1)." *Page Avjet, Inc.*, 278 NLRB at 444 (holding that the employer did not unlawfully interrogate its employee because the question "was free of accompanying coercive statements"). Suvi and Malia both answered truthfully about how they felt working with Mr. Bussiere, which "suggest[s] that the questions did not inspire fear" in the employees. *Sunnyvale Med. Clinic*, 277 NLRB at *10.

The fact that Ms. Ros told Mr. Dragone about the incidents at her store *after* the fact, does not support an inference of unlawful surveillance. The only reason Ms. Ros told Mr. Dragone about this incident, is because he happened to be covering for Ms. Ros's District Manager. (Tr. 688). Further, Ms. Ros voluntarily told Mr. Dragone that Mr. Bussiere had been at her store and had posted an article on the community standards board. (Tr. 690, 683-84). There is no evidence that Mr. Dragone instructed Ms. Ros to question other partners about any alleged protected activities. Thus, there is no credible basis for finding unlawful interrogation by Ms. Ros. The Complaint should be dismissed, in pertinent part.

E. Starbucks did not discriminate against Mr. Bussiere with regard to barista training.

The General Counsel alleges that Starbucks violated § 8(a)(1) and (3) of the Act by allegedly refusing to assign trainer opportunities to Justin Bussiere, because of his alleged union and protected concerted activities. ¶¶ 12(d), (e); 14, 15. Under *Wright Line*, the General Counsel has the burden of persuading by a preponderance of the evidence that union or other protected conduct was a substantial motivating factor for the employer's adverse employment action. However, there is no factual support for this allegation. The record evidence establishes that on

October 22, 2019 Mr. Bussiere talked to Mr. Vaughan for the first time about the fact that he wanted to train more partners. (Tr. 349-50). However, around this same time, Mr. Vaughan was dealing with Mr. Bussiere's performance issues related to his inability to properly fill the pastry case and his failure to adhere to the uniform requirements. (Tr. 942-43, 807, 812-13). Mr. Vaughan testified that although Mr. Bussiere was a barista trainer, he did not give him an opportunity to train other partners, because "he wasn't performing his duties the way, properly, the way he was supposed to perform them. So I couldn't entrust another, a new [partner] to him." (Tr. 943). In light of Mr. Bussiere's ongoing performance issues, Starbucks had a legitimate reason to assign training duties to other partners. Thus, the General Counsel has failed to establish that Starbucks discriminated against Mr. Bussiere with regard to barista training and this claim should be dismissed.

F. Starbucks Did Not Interfere with Employees Section 7 Rights

The test for evaluating whether an employer's conduct violates Section 8(a)(1) is whether the conduct has a reasonable tendency to interfere with, restrain, or coerce protected activity. *Station Casinos, LLC*, 358 NLRB 1556, 1573 (2012). In deciding whether an employer has made a threat in violation of this prohibition, the Board considers the totality of the circumstances in assessing whether a statement or conduct has a reasonable tendency to interfere, restrain, or coerce employees. *KSM Indus.*, 336 NLRB 133 (2001); *Mediplex of Danbury*, 314 NLRB at 471. The test for is an objective one. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 2-3 (2016).

1. Ms. Bissell's Statements Did Not Violate Section 8(a)(1) of the NLRA.

The General Counsel claims that Starbucks violated § 8(a)(1) of the Act on or about February 17, 2020 when Ms. Bissell allegedly prohibited Mr. Bussiere from complaining about Respondent's management and partners' terms and conditions of employment during work time while permitting partners to talk about other work and non-work subjects. ¶¶ 8, 14. The General

Counsel's claim must fail because he has not established that any statements by Ms. Bissell were coercive or interfered with partners' Section 7 rights.

Starbucks does not dispute that, after witnessing Mr. Bussiere distracting other partners and failing to perform his duties of greeting and creating a positive environment for customers, Ms. Bissell approached Mr. Bussiere and told him "that while on the floor and clocked in [he should] have positive conversations that align with Starbucks morals and missions but on his own time of course can do/say whatever. Ms. Bissell's statement, however, did not interfere with Mr. Bussiere's Section 7 rights. Indeed, she explicitly informed Mr. Bussiere that he was free to speak on any subjects on his own time, but when working on the floor, in close proximity and full view of customers, he should focus on positive topics aligned with Starbucks' mission.

The circumstances surrounding Ms. Bissell's statement were not coercive. Ms. Bissell did not threaten Bussiere with a corrective action or imply that there would be any reprisal if he did not focus on positive topics. Instead, she framed her conversation as a coaching conversation to help Bussiere perform the duties of a Barista to the best of his abilities. Her statement accordingly could not reasonably be viewed as coercive and the General Counsel's claim must be dismissed. *See, e.g., Continental Indus., Inc.*, 279 N.L.R.B. 920, 920 (1986) (statements made to open and active union supporters, in non-coercive circumstances and without any unlawful threats or promises, do not violate section 8(a)(1)).

2. Mr. Vaughan's Statements Did Not Violate the NLRA.

The General Counsel also claims that on or about February 19, 2020, Starbucks violated § 8(a)(1) of the Act, when David Vaughan Jr. allegedly prohibited partners from concertedly discussing their terms and conditions of employment during work time while permitting partners to talk about other work and non-work subjects. ¶¶ 9, 14. In addition, the General Counsel claimed that Starbucks violated § 8(a)(1) of the Act on or about November 20, 2019, when David Vaughan

Jr. allegedly told an partner that he reduced an partner's work hours because the partner engage in protected concerted activities. ¶¶ 5, 14.

On February 19, 2020, Mr. Bussiere approached Mr. Vaughan with the purpose of recording his response to the aforementioned incident with Ms. Bissell. (Tr. 454-55). During this conversation Mr. Bussiere told Mr. Vaughan that Ms. Bissell told him that he could not say anything negative about Starbucks management and asked if it was true. (GCX-12A; GCX-12B). Mr. Vaughan responded:

Party 2: Whenever you're [a partner] you're supposed to be having upbeat conversations that align with Starbucks's missions and values. Part of your— When you clock in, you agree to work in a manner that align with Starbucks's mission and values. So, whatever it is that you're doing or saying needs to align with that because that's part of what you signed up to do.

Party 1: Okay. But if I'm talking about, like, the workplace, and if it's, like—

Party 2: If there's something specifically going on in the store, and the other partners— and you guys wanna talk about it, specifically, then that's fine. You can't bring out drama from another store, and negativity, drama about other people and other managers in the same room of one store, where you're talking (inaudible), talking to the customers, (inaudible), because what you're doing is causing just a realm of unnecessary drama.

(GCX-12A; GCX-12B).

Mr. Vaughan did not threaten or otherwise coerce Mr. Bussiere. Mr. Vaughan's clarification that Mr. Bussiere could talk to other partners about issues at the store but should not talk about workplace issues at other stores when talking to customers does not violate the Act. Any adverse impact on Mr. Bussiere's protected rights is outweighed by the employer's legitimate business interest in ensuring that its employees are providing services to their customers and maintaining a harmonious work environment. See *Malco Enterprises of Nevada, Inc.*, 2019 WL 1123556 (Mar.

8, 2019)(Holding that employer rules requiring employees to “never speak negatively about one another in front of others whether it be customers, peers or management,” and to “always conduct him or herself in a polite, professional manner, treating customers and co-workers courteously and respectfully,” were lawful Category 1 rules under the *Boeing* standards, because the rules did not prohibit or interfere with rights protected by the Act, and merely promoted harmony and civility in the workplace); See also *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132 (2020) (holding that an employer has “legitimate justifications in prohibiting employees from disparaging their employer or its products to the employer's customers and the public” and that “[legitimate interest in conveying to employees its expectation that they will perform their jobs in a manner that will do the employer proud, without sabotaging or otherwise impairing its operations.”).

3. Mr. Dragone’s Statements Did Not Violate the NLRA.

The General Counsel claimed that Starbucks violated § 8(a)(1) of the Act on or about November 21, 2019, when Mr. Dragone allegedly required a partner to cease making concerted complaints about the partner’s Store Manager. ¶¶ 6, 14. The General Counsel’s claim must fail because he has not established that any statements by Mr. Dragone were coercive or interfered with partners’ Section 7 rights.

On November 21, 2019, Mr. Bussiere was issued a written warning for failing to meet the expectations of a Barista. (J-15). The disciplinary notice provided that: the Store Manager had been approached by several partners stating that Mr. Bussiere’s behavior was becoming a distraction. (*Id.*) Mr. Dragone shared with Mr. Bussiere that other partners had complained that Mr. Bussiere was distracting them from work and that they have brought those concerns to Mr. Vaughan and Mr. Dragone (Tr. 1116 (Dragone Testimony)). Specifically, Mr. Vaughan had received an email from Ms. Siburt complaining about Mr. Bussiere’s attempts to distract her at work. (JX-14).

There is no evidence that Mr. Dragone prohibited or otherwise coerced Mr. Bussiere from engaging in protected activities. Mr. Dragone's statement that Mr. Bussiere should treat his co-workers with respect cannot reasonably be viewed as threatening or coercive, particularly here, where Starbucks was receiving feedback from partners that they were being made to feel uncomfortable. Accordingly, this allegation must be dismissed.

4. Mr. Eckensberger's Statements did not violate the NLRA

The General Counsel alleges that Starbucks, through Regional Director, Mr. Eckensberger, violated Section 8(a)(1) by telling partners not to make concerted demands to Starbucks and that engaging in protected concerted activities would harm partners' relationship with Starbucks. Complaint ¶ 4, 14. The General Counsel's claim must fail because he has not established that any statements by Mr. Eckensberger were coercive or interfered with partners' Section 7 rights.

Starbucks does not dispute that Mr. Eckensberger stated that "demand reply demand reply" was not compatible with Starbucks' mission and values. (R-1A; R-1B). However, Mr. Eckensberger's statement did not violate Section 8(a)(1) because, when examined in the context of both the larger conversation between Mr. Eckensberger, Ms. Cioffi, Mr. Bussiere, and Ms. Nowakowska, as well as the more immediate context immediately preceding and following the statement, Mr. Eckensberger's statement could not reasonably be viewed as coercive or interfering with Section 7 rights.

Mr. Eckensberger made this statement while he and Ms. Cioffi were speaking with Mr. Bussiere and Ms. Nowakowska to obtain more information regarding the concerns raised in the July 22 email. This statement was not made during a disciplinary meeting, and there was no implication that Mr. Bussiere or Ms. Nowakowska would be disciplined or subject to any other consequence for making "demands" to Starbucks.

Rather, the record shows that Mr. Eckensberger made this statement in direct response to the demand that Starbucks terminate Ms. Graves. Mr. Eckensberger explained that Starbucks would investigate and engage in due process prior to making any decisions about Ms. Graves' employment, as it would prior to terminating any partner who was alleged to have engaged in similar misconduct. (Tr. 270 (Nowakowska Testimony), 562 (Bussiere Testimony); R-1 A; R-1 B).

Immediately after stating that “demand[,] reply; demand, reply” was not in accordance with Starbucks' mission and values, Mr. Eckensberger emphasized that he wanted an “open dialogue” with Mr. Bussiere and Ms. Nowakowska regarding their concerns. (R-1 A; R-1 B; Tr. 15). Because Mr. Eckensberger immediately emphasized that he wanted to engage in an ongoing conversation with Ms. Nowakowska and Mr. Bussiere, they could not have reasonably concluded that Mr. Eckensberger was trying to dissuade them from bring their workplace concerns to Starbucks' attention.

Further, any claim that the statement was coercive or interfered with Section 7 rights is belied by the fact that Starbucks immediately responded to Mr. Bussiere and Ms. Nowakowska's demands by terminating Ms. Graves and rolled out a shift swap application. (Tr. 152, 303, 341). When Mr. Eckensberger's statement is viewed in the context of the entire conversation with Mr. Bussiere and Ms. Nowakowska and Starbucks' subsequent response to their demands, his statement cannot reasonably be viewed as coercive.

G. Reinstatement And Backpay Are Barred Because Starbucks Would Have Terminated Charging Parties For Violating Its Lawful No-Recording Policy

Even if Starbucks were found to be in violation of the Act, the remedies of reinstatement and back pay are barred by the “after acquired evidence” doctrine. *John Cuneo, Inc*, 298 NLRB 856, 856 (1990); Under this rule, neither reinstatement nor front pay is an appropriate remedy for an unlawful termination “where there is after acquired evidence of wrongdoing that would have

led to termination on legitimate grounds had the employer known about it.” *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 361-62 (1995) (explaining the after-acquired evidence rule in a case involving claims under the ADEA). *See also Tschiggfrie Props., Ltd & Teamsters Local 120*, Case 25-CA-161304, 365 NLRB No. 34 (Feb. 13, 2017) (backpay and reinstatement cut off by establishing “that [employee] engaged in misconduct for which the [employer] would have lawfully discharged any employee.”), *enf’d in part, set aside on other grounds Tschiffrie Props., Ltd. v. NLRB*, 896 F.3d 880 (8th Cir. 2018).

The employer has the burden of proving that it would have discharged an employee for the employee’s unprotected conduct. *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993). Employers can meet this burden by showing that an employee violated a policy that requires termination. *John Cuneo, Inc.*, 298 NLRB at 856 (employer carried its burden by showing that it “had a policy of not hiring applicants who misstate their employment background on their applications.”); *In Re Aldworth Co.*, 338 NLRB 137, 147 (2002) (after-acquired evidence rule cut off back pay where employer showed that it considered violation of handbook policy serious, unacceptable, and warranting termination). If the employer meets its burden, the discriminatees’ back pay is tolled as of the employer’s discovery of the alleged misconduct, and the discriminatee is not entitled to reinstatement. *Id.*

1. Starbucks Established that it maintained a lawful no-recording policy and that Ms. Nowakowska and Mr. Bussiere repeatedly violated the Policy.

At all times relevant to the Complaint, Starbucks maintained a Partner Guide. (JX2a-b).⁹ The Partner Guide contains all of the Company’s policies with regard to terms and conditions of employment, including Starbucks no recording policy. Starbucks’s no recording policy provides

⁹ Starbucks’s 2017 Partner Guide contains the applicable policy. Starbucks’ 2020 Partner Guide was not rolled out until April of 2020, after the Charging Party’s respective terminations.

in relevant part:

Personal video recording, audio recording or photographing of other partners or customers in the store without their consent is not allowed unless authorized by law.

JX2a-000036.

Both Mr. Bussiere and Ms. Nowakowska acknowledged that they had received a copy of the Partner Guide, which includes a no-recording policy during their employment. (Tr. 300; 320). Employer policies prohibiting recordings that are illegal are lawful Category 1 rules under *The Boeing Co.*, 365 NLRB No. 154 (2017); *ADT, LLC & Int'l Bhd. of Elec. Workers, Locals 46 & 76*, No. 19-CA-216379, 2019 WL 3006928 (July 9, 2019) (noting Employer rule prohibiting employees from making unauthorized recordings in states that prohibit non-consensual recording was lawful under *Boeing*); *G&L Real Estate*, 2019 NLRB LEXIS 603 (2019) (ALJ Ringler) (upholding as lawful and analogous to the no camera rule in *Boeing* a company policy prohibiting recording conversations at or related to work). Starbucks has a legitimate interest in ensuring its employees do not violate state law, or in this case, commit a felony, while working. Like in *Boeing*, Starbucks' rule does not explicitly restrict any activity protected by the Act, it was not adopted in response to protected activities, and it was not applied to restrict such activities.

While Starbucks had suspicions that Mr. Bussiere had attempted to record other Starbucks partners, Starbucks had no evidence that Mr. Bussiere and Ms. Nowakowska had *actually* recorded other Starbucks partners until the hearing. Mr. Vaughan testified that on one occasion, Mr. Bussiere approached him with a question about the schedules and held his phone in his hand as if he were recording the conversation. (Tr. 786). During this conversation, Mr. Vaughan explicitly told Mr. Bussiere that he did not have authority to record him, and Mr. Bussiere responded that he was not recording him. (*Id.*) Mr. Vaughan reported the incident, which occurred relatively early in his tenure as Store Manager, to Mr. Dragone, whose notes reflect:

10/24-It came to dm Brian Dragone's attention via SM David Vaughan that TJ was attempting to record, via phone, conversations between them. SM addressed and to our knowledge no further attempts have been made.

GCX37t-000003.

Similarly, on another occasion Ms. Nowakowska walked to the back room with Mr. Vaughan, and, Mr. Vaughan explicitly told her "you do not have permission to record me." (Tr. 212-13). However, Ms. Nowakowska responded that she was not recording him and offered to show him her phone. (*Id.*) Mr. Vaughan also testified that during his first weeks at the Broad & Washington store, Mr. Bussiere and Ms. Nowakowska both approached him and asked him what he would do if someone disrespected a transgender partner in the store. (Tr. 787). Mr. Vaughan testified that while he was responding to their questions, Ms. Nowakowska tried to record him. (Tr. 788). When Mr. Vaughan accordingly tried to end the conversation, Ms. Nowakowska threatened to call the NLRB, because she did not like his response. (Tr. 789).

Mr. Bussiere also sent Mr. Vaughan what appeared to be in part transcriptions of conversations between himself and other Starbucks partners. (GCX-7). At the hearing, Mr. Bussiere confirmed for the first time the existence of an audio recording that he used to create the transcriptions he sent to Mr. Vaughan. (Tr. 359-61). Although Mr. Bussiere could have just sent Mr. Vaughan a copy of the audio recording during his employment, he did not affirmatively disclose that he had a recording, and instead spent "a few hours" transcribing the recording. (*Id.*)

Through the course of this hearing Starbucks learned for the first time that the Charging Parties had *in fact* made **over thirty (30)** unauthorized recordings of their conversations with other Starbucks partners and customers. Ms. Nowakowska testified that she made four (4) recordings of conversations, without the participant's consent:

A. Yes. So first was the July 26 meeting with Marcus Eckensberger and Nathalie Cioffi. The second was the July 29 meeting with

Marcus Eckensberger and Nathalie Cioffi. The third was a conversation I had I believe it was on September 22 with David Vaughan, and the fourth was my disciplinary conversation on October 29 with David Vaughan and Brian Dragone.

(Tr. 240).

There is no evidence on the record that Ms. Nowakowska obtained the consent of all participants prior to making these audio recording. Ms. Nowakowska in fact admitted that she was aware that under Pennsylvania law all parties must consent to a recording and that it was a felony to record without their consent yet she still decided to do so. (Tr. 300).

Similarly, Mr. Bussiere testified that he made over thirty (30) recordings:

Q. And how many total recordings did you make during your employment prior to your discharge?

A. Probably 30 or a little bit more.

(Tr. 464).

There is no evidence on the record that Mr. Bussiere obtained the consent of other participants prior to making any of these audio recording. Instead, the record evidence shows that Mr. Bussiere was aware of Starbucks's no recording policy, yet still decided to make recordings. (Tr. 465). Thus, Starbucks has established through a preponderance of the evidence that Mr. Bussiere and Ms. Nowakowska violated the company's no recording policy.

2. Mr. Bussiere and Ms. Nowakowska's recordings lose the protections of the NLRA Because They Violated Starbucks Policy and Pennsylvania law.

In an attempt to excuse Mr. Bussiere and Ms. Nowakowska's repeated violations of Starbucks's no recording policy, the General Counsel will likely argue that Mr. Bussiere and Ms. Nowakowska's recordings were authorized under Section 7 of the NLRA. This argument must fail, however, under the relevant binding legal standards

On its face, a violation of Starbucks no recording policy occurs only if the recording is not

authorized by law. Therefore, if Pennsylvania prohibited such recordings, Ms. Nowakowska and Mr. Bussiere's conduct would be both illegal and in violation of Starbucks's policy, and would lose the protections of the NLRA. *Hawaii Tribune-Herald*, 356 NLRB 661 (2011). In Pennsylvania, it is a crime to record an oral communication, unless all parties to the conversation consent. See 18 PA. CONS. STAT. § 5702. The statutory definition of "oral communication" requires a justifiable "expectation that such communication is not subject to interception." *Id.* § 5702. The Pennsylvania Supreme Court has interpreted the term "oral communications" to include only communications where "the speaker possessed a reasonable expectation of privacy in the conversation." *Agnew v. Dupler*, 553 Pa. 33, 717 A.2d 519, 523 (1998).

The NLRB recently addressed a similar case in *ADT, LLC & Int'l Bhd. of Elec. Workers, Locals 46 & 76*, No. 19-CA-216379, 2019 WL 3006928 (July 9, 2019). In *ADT*, the Employer maintained a rule that prohibited employees from making unauthorized recordings in states that prohibit non-consensual recording. *Id.* After two employees made a recording of a captive audience meeting with dozens of employees without obtaining the consent of the participants, the employer terminated the employees. In considering whether the employees' actions lost the protection of Section 7 of the NLRA, the Judge first examined whether the employee's conduct constituted a violation of state law. After weighing the applicable statutory factors, the Judge concluded that the employees' actions *did not* violate Washington State's Privacy Act, because there was no expectation of privacy in the employer's captive audience meeting.

Unlike the employees in *ADT*, Mr. Bussiere and Ms. Nowakowska both recorded oral communications with Starbucks partners (managers and non-managers) and even customers where the participants had a reasonable expectation of privacy. First, there was an expectation of privacy when Ms. Nowakowska and Mr. Bussiere met with Ms. Cioffi and Mr. Eckensberger on July 25,

2019. (R-1A; R-1B). During this meeting, when Mr. Bussiere tried to add another partner via phone, Ms. Cioffi did not allow it and reiterated to partners that they were having a private meeting. (Tr. 264). Despite this statement reaffirming the private nature of the meeting, Ms. Nowakowska recorded the conversation without obtaining the consent of the participants. (Tr. 297; R-1A; R-1B). Second, David Vaughan and Jean Hippensteel also had a reasonable expectation of privacy when they met with Mr. Bussiere in December of 2019. Mr. Vaughan pulled Mr. Bussiere aside so that he could speak to him and Jean Hippensteel more privately away from the floor. (R-8A; R-8B).

There is no plausible conclusion other than both Ms. Nowakowska and Mr. Bussiere violated Pennsylvania law when they chose to record partners on the specific occasions outlined above as well as the 30 plus other occasions, including recording customers, and their actions therefore lose the protection of the Act. *Com. v. Smith*, 2016 PA Super 43, 136 A.3d 170 (2016) (defendant's use of "voice memo" app on his smartphone to surreptitiously record conversation with his supervisor constituted a violation of the Pennsylvania Wiretap Act.); *Brantley v. Wysocki*, 662 Fed. Appx. 138, 143 (3d Cir. 2016) (noting that there was probable cause to conclude an employee violated the Pennsylvania Wiretap Act when she recorded a "coaching" conversation with her supervisor).¹⁰

¹⁰ See also: *Argyropoulos v. City of Alton*, 539 F.3d 724, 734 (7th Cir. 2008) (Title VII does not "grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination"; *Jones v. St. Jude Med. S.C., Inc.*, 504 F. App'x 473 (6th Cir. 2012), (holding that employee's secret recordings of conversations with other employees, management or clients did not constitute conduct to oppose alleged discrimination under Title VII, where she could have taken notes of the conversations, obtained the same information through legal discovery, or simply asked her interlocutors for permission to record.).

3. Starbucks has established that it would have terminated Mr. Bussiere and Ms. Nowakowska if it had known that they recorded other partners without their consent and that they are not eligible for re-hire.

It is undisputed that making unauthorized recordings of Starbucks partners in violation of State law is a terminable offense, as well as a felony under Pennsylvania law. (Tr. 1338-39). Mr. Bussiere's recordings were not limited to management, and in fact the recordings show quite the opposite. Mr. Bussiere captured entire conversations with co-workers and even customers. (R-5A; R-5B). To the extent customers were admittedly recorded there is no denying that they certainly have an expectation of privacy in their normal interactions with partners and would have no reason to believe they are being recorded.

The General Counsel did not present any evidence to suggest that Starbucks does not terminate partners for violating its no recording policy. On the contrary, the record evidence shows that Starbucks has terminated partners for making unauthorized recordings of other partners on Starbucks premises, while at work. On September 20, 2018, Starbucks terminated Brian Soy, after he told his manager, and admitted to his shift supervisor and Store Manager, that he had recorded a conversation between himself and another shift supervisor, in violation of Starbucks's no recording policy. (GCX-13(r)). Similarly, the Company also terminated Aniya Rosado, after she left a recording device in the back of house in order to capture a conversation between two non-consenting partners in violation of Starbucks's no recording policy. (GCX-13(q)).

Not only have Starbucks partners been terminated for making unauthorized recording of other partners without their consent, Mr. Eckensberger also testified that if a partner is terminated for recording other Starbucks partners without their consent, he/she is not eligible for re-hire. (Tr. 1339). Thus, even if Mr. Bussiere or Ms. Nowakowska's terminations are found to violate the Act, the Employer has shown that it would have terminated Mr. Bussiere and Ms. Nowakowska for

their egregious behavior in recording other partners without their consent, and their actions cut off any right to reinstatement. *John Cuneo, Inc.*, 298 NLRB 856 (1990) (holding if an employer establishes that an partner engaged in misconduct for which the employer would have discharged any partner, reinstatement is not ordered, and back pay is terminated on the date that the employer first acquired knowledge of the misconduct.)

V. CONCLUSION

For the reasons set forth fully above, Starbucks requests that all of the General Counsel's claims be dismissed and that judgment be entered in favor of Starbucks. To the extent the terminations are not sustained, reinstatement and backpay are not appropriate in this case in light of the after acquired evidence of the Charging Parties' misconduct.

VI. PROPOSED CONCLUSIONS OF LAW REMEDY AND NOTICE

Based on the evidence presented at the hearing and the foregoing authorities and conclusions of law, Starbucks urges that the General Counsel has failed to meet its burden and that this Complaint be dismissed with prejudice and that judgment be entered in its favor.

Dated: March 31, 2021

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